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In the Supreme Court of the United States

October Term, 1925.

Number [redacted] 170 31

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Appeal from the District Court of the United States for the Northern District of Ohio, Eastern Division.

BRIEF ON BEHALF OF THE APPELLANTS.

James Metzenbaum,
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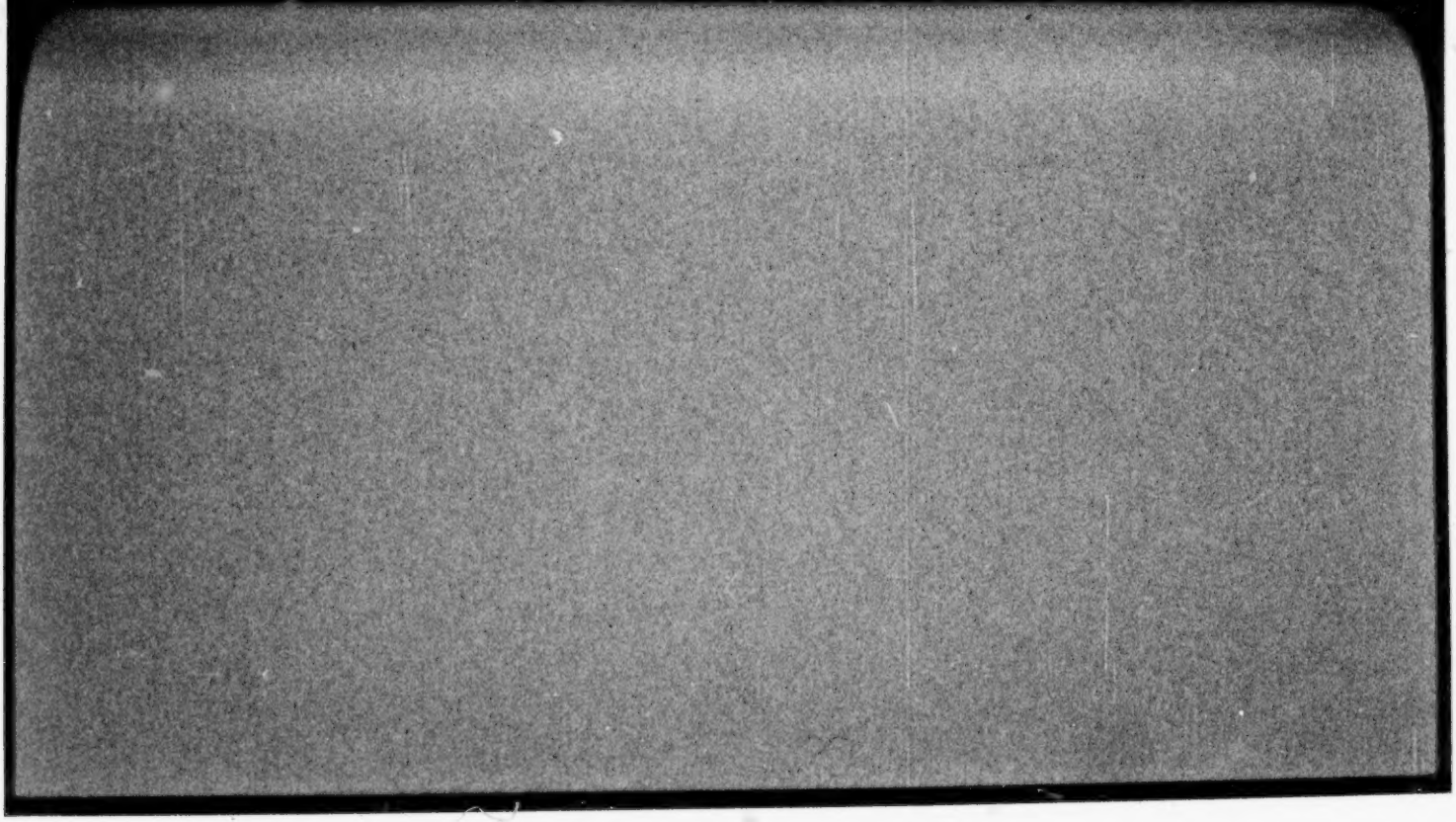
Counsel for the Village of Euclid and The Inspector of Building.



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BRIEF ON BEHALF OF THE APPELLANTS.

STATEMENT OF THE CASE.

This cause comes before this Court upon an appeal by the Defendants from a decree of the District Court for the Northern District of Ohio. The Appellant is an incorporated Village—being incorporated under the laws of Ohio and being located in Cuyahoga County, Ohio. The Appellee is an Ohio corporation, having its principal place of business in the city of Cleveland, Ohio. The opinion of the trial Court is printed at pages 52 to 61 of the Record and is reported in 297 Federal Reporter 307, the decision having been rendered on the 14th day of January, 1924.

BILL OF COMPLAINT.

The Bill of Complaint, found on pages 1 to 28 of the Record, was filed on May 5th, 1923, and asserts, in substance, that the Complainant is the owner of a parcel of property located within the Village of Euclid, Cuyahoga County, Ohio, and being situated between Euclid Avenue —as its southerly limit, and the Nickel Plate Railroad—as its most northerly limit and being further situated shortly west of the thoroughfare known as Dille Road and that the Village of Euclid, by action of its Village Council had on the 13th day of November, 1922, enacted an Ordinance establishing a zone plan, regulating the location of industries, trades, apartment houses, two-family houses, single-family houses and other uses of property, the area and dimensions of lots and yards and the bulk and alignment of buildings near street frontages. (This ordinance appears on pages 13 to 27 of the Record.)

The Bill of Complaint alleges that this Ordinance lessens the value of the Complainant's property, restricts and limits the uses to which it may be devoted and attempts to impose limitations and restrictions which are in contravention of the Constitution of the State of Ohio as well as in violation of the Constitution of the United States and upon these grounds the Complainant sought a permanent injunction at the hands of the United States District Court.

MOTION OF DEFENDANTS.

The Village of Euclid and its Inspector of Building interposed a motion to the effect that because the Complainant had not even applied for a building permit for construction upon any portion or all of the land in question, and because such a permit had never been refused and furthermore because the Ordinance itself provides

for a Zoning Board of Appeals which has power and authority to vary the strict and literal terms of the Ordinance under certain circumstances as recited in the Ordinance itself, that therefore—for each and all of these reasons—the Bill of Complaint presented but a moot and unripened question. This Motion to dismiss the Bill of Complaint was filed on July 20th, 1923, and appears upon page 27 of the Record.

On November 9th, 1923—as appears on page 27 of the Record—this Motion was overruled by the District Court. To this defendants noted their exception.

ANSWER.

Under date of November 14th, 1923, the defendants filed their Answer in the District Court and in this Answer the defendants set forth that the original Zoning Ordinance as adopted on the 13th day of November, 1922, had been materially amended by an amendatory Ordinance which was enacted on the 11th day of June, 1923—prior to and before the filing of the Bill of Complaint.

In this Answer the defendants set forth: That though the Bill of Complaint alleged as the primary grievance, the fact that the property of the Complainant was restricted against industrial, manufacturing and business purposes, to the extent of all but 500 feet distant and south from the Nickel Plate track, the true facts were as set forth in the amending Ordinances of June 11th, 1923, which was pleaded by the defendants (please see lower portion of page 35 and all of page 36 and upper half of page 37 of the Record), as permitting and allowing factory, industrial and all business uses to the extent of approximately 1200 feet distant and south from the Nickel Plate track and that the inhibition against industrial, manufacturing and business purposes extended to but a

distance of 620 feet north of Euclid Avenue, thus leaving approximately *1200* feet—from this 620 foot line over to the Nickel Plate tracks—open and free and permissible for industrial, manufacturing and business uses. (Last paragraph on page 29 and top of 30 of Record and Defendant's Exhibit No. 2—map.)

That the Nickel Plate Railroad, which lies approximately 1800 feet north of Euclid Avenue, was paralleled 1600 feet further north by the Lake Shore Railroad tracks and that the Lake Shore Railroad tracks were themselves paralleled on the north—at a distance of 1600 feet—by St. Clair Avenue and that St. Clair Avenue was paralleled —at a distance of approximately a mile—by the Lake Shore Boulevard and that the Boulevard was paralleled—at a distance of 2000 feet—to the north by the shore of Lake Erie. (Please see Map, which is Defendant's Exhibit 2.)

That the Village has a length—from east to west—of approximately 3½ miles and that all of the land bordering on the south of the Nickel Plate track and thus lying between Euclid Avenue and the Nickel Plate track, was free and open—throughout this 3½ mile length of the Village—and to a width of approximately 1200 feet south of the Nickel Plate track for industrial, manufacturing and business purposes, except where residence streets had been laid out from Euclid Avenue to the Nickel Plate track and where these streets had already been built on with residences. (Page 30 of Record)

That in addition to this great area which, by the Zoning Ordinance, had been left free and open (except for generally recognized nuisance purposes, such as glue factories, tanneries, brick kilns and the like) there was left open for industrialism, by the terms of the Ordinance, *all* of the entire 3½ mile Village length which lay *between*

the Nickel Plate tracks and the Lake Shore tracks—constituting a stretch 3½ miles long and approximately 1600 feet wide. (Upper part of page 30)

That beyond this, the Zoning Ordinance had left virtually all of the northerly side of the Lake Shore Railroad tracks—3½ miles long—free and open for industrial uses. (Page 30 of the Record)

No Industrial or Commercial use has ever built or applied for permission to build in restricted zone.

The Answer further alleged: That not a single industry had ever applied for a permit to build or had ever built any factory, industrial plant, store, commercial or other building within any of the territory forbidden by the Zoning Ordinance (lower half of page 30 and middle of page 29 and lower part of page 34).

Industrial and Commercial use would injure Health, Safety and Welfare of Community.

The defendant alleged that the use of this restricted strip of complainant's land, which lay adjacent and close to Euclid Avenue, if permitted for industrial, manufacturing or commercial purposes, would be injurious to and would be subversive of the health, the safety and the general welfare of the community.

It was set forth in the Answer and much of the testimony tended to prove that by virtue of the Zoning Ordinance, the value of the property of the complainant had been *increased* and that its use in accordance with the Zoning Ordinance would really mean greater profits and earlier income than if held for industrial or manufacturing or commercial purposes and that instead of the Ordinance having lessened or reduced the value of the complainant's land it had and would, in reality, increase and

enlarge the value and the profits to be received from this land.

It was further alleged by the defendants that the complainant had never made any application for any building permit and had never been refused any permit and that it had never applied to the Zoning Board of Appeals for any relief from any refusal on the part of the Inspector of Building to issue a permit, nor had the complainant applied to the Village Council for any amendment of or relaxing of the Zoning Ordinance even though the Ordinance itself provided a full and sufficient course of procedure in each of these respects.

The Answer pleaded the fact that Section 3 of Article XVIII of the Constitution of Ohio (being the so-called comparatively recent Home Rule Amendment adopted in 1912) had authorized municipalities in Ohio, to adopt and enforce, within their respective corporate limits, such local police regulations as are not in conflict with the general laws and that the Legislature of Ohio on February 20th, 1920, had established a Zoning Enabling Act set forth under Sections 4366—1 to 4366—12 of the General Code of Ohio and that the Zoning Ordinance in question had been enacted by virtue of said Section 3 of the Ohio Constitution and by virtue of the express authority of Sections 4366—1 to 12 of the laws of Ohio. (Enacted in 1920 and found at pages 1125 to 1127, Throckmorton's Code of Ohio Laws.)

Study and Investigation of conditions and dangers before Ordinance was enacted.

In conclusion, it was pleaded and proof was offered—that before any of the provisions of the Zoning Ordinance had been adopted, a most thorough investigation and research and study had been made by a Commission ap-

pointed under and by virtue of the aforesaid State Enabling Act and the results and reports of many other investigations from other cities and states had been carefully considered and every phase of the entire subject and of each section and portion of the Village had been thoroughly considered and surveyed and taken into account and after this most exhaustive research the Zoning Ordinance had been adopted by the unanimous vote of the Council of the Village of Euclid, in the exercise of its Police Power and for no other purposes and solely in order to provide and promote the safety, the health and the general welfare of the people of the community.

As hereinafter pointed out, each of these allegations in the Answer of the Defendants was supported by proof and evidence and most of the allegations were uncontradicted and admitted by the complainant, except as to the lessening of the value of the land of the complainant, except as to the Ordinance being within the Police Power and as to the question of the constitutionality of the Ordinance.

HOW TESTIMONY WAS TAKEN.

All of the testimony was taken by depositions and no witnesses appeared before the District Judge. The Court (page 52 of the Record) stated that:

> "After issue joined, the evidence was taken and submitted in deposition form.
>
> "This case is obviously destined to go higher. On appeal in equity cases, a reviewing court weighs the evidence, and when taken in deposition form it can do so as well as the trial court."

The Trial Court having held the Ordinance wholly null and void and having decreed a permanent injunction against the enforcement of any and all parts of the Ordinance, as prayed for by the Complainant, this cause is

brought, on appeal, to the Supreme Court of the United States by virtue of Section 238 of the Federal Code of Procedure and here the Village of Euclid and its co-defendant ask that the Supreme Court of the United States may reverse the decree of the Trial Court and may hold the Bill of Complaint to be unentitled to the relief prayed for therein.

FACTS AS ADDUCED BY THE TESTIMONY. ARGUMENT IN CONNECTION WITH THE FACTS.

The Situation in the Village of Euclid:

The Village of Euclid lies to the east of Cleveland and East Cleveland, with Lake Erie on its north, the highlands south of Euclid on the south, and the Cuyahoga County line on the east.

Three main highways traverse it from east to west: Lake Shore Boulevard along the lake shore; St. Clair Avenue about the center of the village; and Euclid Avenue on the south. The Nickel Plate Railroad passes through the village about eighteen hundred feet north of Euclid Avenue and the New York Central Railroad some distance north of the Nickel Plate. The property adjoining these railroads is admirably adapted for industrial development and is *freely permitted* for such uses by the Zoning Ordinance. (See Map—Defendant's Exhibit 2. All thereon in red is open to Industrial uses.)

During the war and for a year thereafter there was great activity in Greater Cleveland, in factory development, and stimulated with the belief that the demand would continue, there was created a great boom in all vacant land adjacent to railroads. Great tracts were bought up by speculators and prices increased many times above the value of vacant farm land, to extravagant prices

demanded for so-called factory sites, considering the great area of such land throughout the metropolitan area of Greater Cleveland. The Village of Euclid came in for its share of this industrial boom, and prices for the land along both railroads went soaring.

But even during all of this boom not a single commercial or factory or industrial structure or store was built in the entire 3½ mile strip adjoining Euclid Avenue, even though there was no such ordinance then in effect.

Then came the collapse of 1920 and the fires in many of the mills and factories in the country went out. An inventory thereafter found most of the factories had expanded beyond the demand for their products. There was no expansion in 1921, little in 1922, and even now we find all the witnesses who have testified here, say that at the present time there is *no* demand for factory sites especially in such an outlying territory as Euclid Village.

Witnesses of recognized standing testified that it will take some years to make full use of even the present factories in the village. (Bottom of page 129, page 180, and middle of page 191 of the Record)

For years the village has developed as a residence district instead of manufacturing (Ambler, middle of 143). People were there seeking freedom from smoke and noise. The President of the complainant company recognized this, laid out a restricted residential allotment *east* of and immediately next to the sixty-eight acre tract involved herein (top of 147, and lower half of 101). This allotment runs up to the Nickel Plate track. All these lots are sold and built upon except the corner lots on Euclid Avenue. Another strictly residential allotment adjoining the sixty-eight acres on the *west* and immediately next to the complainant's 68 acres has been built up. The complainant has held the land described in the Bill of Com-

plaint, for eleven years without development of any kind. There has been, during all that time, a demand for it for home sites and there is a great demand now for that purpose. There is no demand for it for factory sites or business. (Page 199, bottom of 196, upper part of 195; upper part of 160 and top of 161 of Record)

Mr. Greenlund,—former Lieutenant Governor of Ohio and life long resident of Cuyahoga County—of acknowledged experience as a realtor of Cleveland, testified that the best way to develop that property at present time was for home sites. (Pages 180-181 and top of 183; last paragraph of 128.) One could by this means sell it readily and make more money and much more quickly than by holding for future factory development as that was a burdensome process, for taxes and interest charges would consume values.

The claim that the Euclid Avenue frontage should be unrestricted seems untenable from *health, safety* and *comfort* standpoints. Allotments exist all along the hillside south of Euclid Avenue (lower half of page 100 and upper half of 101), and the closer factory development comes the greater discomfort to the home dwellers living there. The claim of the plaintiff that lots in this territory will be devoted to homes "for skilled workmen in the factories as they are established along the railroads" is no answer to this desire on the part of the citizens of the village. These homes—though they may be pictured by the complainant's witnesses as but modest or "workingmen's" homes—should be protected just as far as the circumstances require. (See page 94 at middle; last lines of 158 and top of page 159 and top of page 149.) The Ordinance fixes a line 620 feet north of Euclid Avenue as the limit of approach of factory uses. In view of the fact that no industrial development has been made of a vast part

of the 1400 acres available, and that not even one factory or commercial building or store is now or ever has been located within the restricted line, it does not seem to be unreasonable if restricted, as provided in the ordinance. (Please see lower portion of page 94; last paragraph of page 103 and Mr. Ambler's own admission in the second last paragraph of page 141; middle and lower half of page 34; the mayor's testimony at the middle of page 171 and the proof that the line was established as requested by the industrial interests themselves, as evidenced by the testimony at the lower portion of page 206.)

Indeed, the complainant's own witnesses freely granted that the reasonable and proper development of this 620 foot strip is for residence purposes (kindly note Kunkle, their witness, at last paragraph of page 92 of the Record and the last paragraph of page 140 as testified to by Mr. Ambler himself).

It is important to bear these facts in mind for it was impossible for any of the witnesses to say what the fair market value of any of this industrial land was, for the reason that there is no market and no demand for it at present, and there will not be for some years to come. (All of page 180; last paragraph of 128; top of 161—their witness—and middle of pages 191 and 199.) All the evidence is based upon the asking or intended or estimated prices rather than the market value.

But as all witnesses gave their testimony upon the same theory, a reasonable basis of comparison is afforded. It was the belief of defendant's witnesses that to purchase factory property in the village now at the value given, the carrying charges while awaiting a market would "break the purchaser's back." (Upper part of page 195)

There is, however, a great demand for home sites in the village. Large allotments are laid out on the lake

front, between the boulevard and St. Clair Avenue, and on the hillside which forms the south side of Euclid Avenue. (Middle of page 181 and upper part of 105)

Recognizing the trend of industrialism, which—when unsuperintended—brings the many ills of congestion, noise, smoke, odors, accidents, crowded thoroughfares and their attendant dangers, slums, "blighted" districts, vice and contagious and communicable diseases, the village council began the discussion of a zoning ordinance with a view of establishing a safe and healthful and welfare-serving future development of the village.

One object was to locate the factories reasonably removed from residence districts. This was quite simple, as the factories naturally would follow and had followed close to the railroads.

Vast Area of 1400 Acres served by Railroads is open to Industrial uses.

The Village contains 7400 acres and the property set apart as unrestricted for factory development is from 1400 to 1500 acres lying between Euclid Avenue and St. Clair Avenue, and shaded in red on the zoning map which was introduced into the Record by the Village. (Please see Defendant's Exhibit 2)

Through this vast tract, three and one-half miles in length and almost a mile in width, run two railroads—the Nickel Plate and the New York Central (sometimes termed the Lake Shore Railroad)—thus admirably serving this unrestricted industrial territory with railroad facilities.

The original zoning ordinance—enacted November 13th, 1922, limited this industrial area south of the Nickel Plate track to a line drawn about 500 feet distant and south from the Nickel Plate track. The amended ordinance—

enacted July 11th, 1923, prior to the hearing of this cause —increased this industrial area to a line on an average width of 1200 feet distant and south from the Nickel Plate track or to a line 750 feet north of Euclid Avenue. This 750 feet is zoned by the ordinance as follows: the 150 feet abutting upon the avenue is restricted to one-family houses—to "Use One"; the next strip north of 470 feet is restricted to "Use Two" or two-family residences; the next 130 feet—which approaches and abuts upon the unrestricted industrial territory—is permitted for use by factory administration and by factory offices and similar buildings. This makes a restricted strip abutting upon Euclid Avenue of 620 feet in width.

Safety is one of the prime provisions of this ordinance.

If was felt that in planning this kind of a program, many accidents would be avoided in the future, much congestion would be eliminated and the safety of the people would be very greatly enlarged. (Please note upper portion of 183, all of page 184, lower portion of pages 110, all of 111, 112 and 113; last paragraph of 200; lower half of page 121.)

Some of the witnesses say the value of the land lying between the Nickel Plate Railroad and the 620 foot line is equally valuable per acre for industrial purposes; others say it is more valuable next to the railroad and decreases in value toward the south—that is—toward Euclid Avenue. Some say it is less valuable by reason of the restrictions; others that it is more so because of this very ordinance. (See last paragraph of page 180 and upper half of 181 and upper portions of pages 182 and 185 and top lines of 191 and lower half of page 119; upper part of 121; upper part of 34, middle of 35, bottom of 128.)

HEALTH is a large factor in this ordinance.

The hillside referred to in the testimony and in the Answer (page 125 and lower part of 104; bottom of page 28 and top of page 25), which begins on the south side of Euclid Avenue and which extends along the entire length of Euclid Avenue (3½ miles) throughout the Village—constitutes a most desirable location for home sites by reason of its elevation. The streets on this continuous hillside, as shown by the zoning map, are to a great extent laid out in curves in the manner of boulevards, and the expense of laying out these allotments would seem to preclude the idea that they would or could be sold or used for factory or commercial purposes. It was naturally the desire of the framers of the zoning ordinance to protect these present and prospective developments for home sites, and certainly the nearer the manufacturing development comes to them, the greater would be the discomfort and annoyance to the inhabitants dwelling there and the greater would be the probable and possible impairment of the health and of the healthful conditions of those who now do and who in the future will reside there. (*Please* see lower portion of page 120, all of 121, lower half of 110 and all of 111; page 208; upper half of page 184 and middle of 185.) And there is a necessity, if factory development follows, to provide available territory for the homes of common labor as distinguished from skilled labor, and it was anticipated that these homes could be constructed on the reserve strip north of Euclid Avenue in a portion of the 620 foot strip.

The testimony given by plaintiff's witness Kunkle, is that the property of the plaintiff was more valuable for manufacturing purposes than any other, but that to make the greatest and most profitable use of the property would require the dividing of the complainant's sixty-eight acres

into small manufacturing tracts *with switch connections which would come to the very north line of Euclid Avenue.* (Kindly note lower half of page 93, top lines of page 94; 3rd and 4th (concluding) paragraphs of 161; concluding 5 lines of the second last paragraph of page 89) and when considering this witness' testimony it must be borne in mind that he contemplates that kind of a development—switch tracks operating up to the north line of Euclid Avenue itself. It would appear that reasonable persons would admit it would be most undesirable development from every standpoint of safety and health and general welfare of the community.

At the same time, Mr. Kunkle places a valuation on the frontage of Euclid Avenue in excess of the valuation placed upon the remainder of the property for manufacturing purposes, even at the very high prices that he gives as to the value per acre of the entire tract. If it may be admitted that the Euclid Avenue frontage may some day be more valuable for store purposes than for residences, yet if there be any reasonable relation between the limitation on one hand and the general welfare on the other, that limitation is constitutional.

The ordinance is purposefully drafted so that, in the future and from time to time, as conditions and territories alter, the zone districts may keep step therewith and may be accordingly altered and revised just as Fire Limit ordinances and zones are—from time to time—extended and revised as new and altered conditions demand. But when such revisions are made they will be the result of (a) an apparent *general* situation and need for such modifications and revisions and not due to the dictation or actions of some one single property owner in disregard of the public safety and welfare, and (b) they will be revisions which will be made on the basis and for the purpose of

the Health, Safety and General Welfare of the entire community just as revisions in Fire Zone Districts are not left to the whim or actions of some one property owner but are, on the contrary, the result of action based on the safety and welfare of the entire community. (See Section 25, 25A, B, C and D of the Ordinance on page 25 of the Record; bottom lines of page 186 and top 3 lines of 187 and page 38 of the Record.)

The officials of the village who patiently sat through all the months of considering of the ordinance, who knew every foot of the land, who knew all the conditions of actual development, and were in a position to look forward to the future development of the village, were in a position to determine whether or not the general welfare would be better served by restricting it to residence purposes than for any other purpose. (Pages 167, 168, 169, lower part of 170 and upper portion of 171; lower half of 205 and all of 206.) And if there be any relation of public welfare (as the testimony showed and as we later herein feel has been shown) with this limitation, the courts will not substitute their judgment and will not strike down this regulation or the ordinance as a whole.

WHAT PROOF AS TO DAMAGE OR CONFISCATION?

The testimony of Greenlund and Laronge—the latter being admittedly the most extensive Real Estate operator in Greater Cleveland—is to the effect that plaintiff would receive *more* money for the Euclid Avenue property for residential purposes and receive it more quickly than if the company would hold it for uncertain factory development, as it may be many years before the property is available for such development and there is such a great unrestricted area, that any immediate development of the property for industrial purposes would first be next to

the track, as the track is the magnet that draws the industry and the closer the factory is to the track the more available are its means of transportation. (All of 181, top of 195, all of 180; middle paragraph of page 197 and middle of 199.)

The Complainant's principal witness (Kunkle) toward the lower portion of page 92 of the printed Record gave convincing evidence against there being damage or confiscation, for he said:

> *"The natural and logical way for the development of that property immediately north of Euclid Avenue (which is the 620 foot strip in question) is by allotment for working men's homes."* (Italics and parenthesis supplied)

This witness virtually repeated this opinion in the bottom-most lines of this same page 92 and again in the middle paragraph of page 93.

> "The natural and logical way for development thereof implies the best and most productive way, and therefore if one rests upon the declarations of their principal witness, all proof of confiscation is banished and nullified."

Loss resulting from being limited against injuring the public is not the kind of damage proving unconstitutionality.

If one looks at this same principal witness' testimony in the concluding six lines of page 85 one finds him giving a value at the rate of $44,000.00 an acre for a Euclid Avenue 40 ft. lot with a switch up to it.

Disregarding the fact that (a) this same witness had, when previously before the Notary, at lower part of page 73, given an average value of about $14,000.00 an acre even when so served with switches (upper part of 73),

and (b) that all other plaintiff and defense witnesses said there was no market for industrial land in Euclid (page 160, 161 their witness; middle of 191, 180, 181, 128), and (c) that all defense witnesses placed unrestricted valuations ever so much lower; from $3500.00 to $8000.00 an acre (pages 180, 128, bottom of 131, 196) and (d) that the majority of witnesses said the ordinance would *increase* the value of plaintiff's land (pages 180-181-182, 128, 197, 199), (e) It is nevertheless true that this valuation and the comparative loss pretended to be shown by this zealous and principal witness was based upon the subdividing of these 68 acres into 1 to 5 acre parcels and upon the right to serve these average 3 acre parcels *with switches right up to or parallel with Euclid Avenue,* plainly in disregard of the public safety and welfare. At page 89 this witness said:

> "A plant buying three acres would insist on a railroad. You couldn't sell three acres out there without railroad facilities. The value for industrial purposes on Euclid Avenue would not then be any greater than for any other uses. The railroad is what makes the industrial value, of course."

And this he followed with further testimony concluding at the bottom of page 93 and top lines of 94 as follows:

> "I suppose, if that kind of development takes place, railroad tracks may be built *right alongside of Euclid Avenue,* within clearance distance of the Avenue, the north line of it, unless there is a law to stop it."

So, too, their other witness, in reference to such tracks and danger resulting (161 and lower half of 149 are important).

We repeat that damage resulting from a prohibition to so injure the public does not give grounds for the Trial Court declaring that "substantial damage was proved";

at all events not such damage as is required in order to show unconstitutionality.

Then too, this extravagant valuation was based upon the value of a *40 foot lot on Euclid Avenue* being industrialized and being served with a switch up to Euclid Avenue. Then this eager witness took the square feet in such a *40* foot *Euclid* Avenue lot and multiplied it by the number of feet in an acre and thus he arrived at this valuation, which we submit is a specious form of reasoning, for the reason that an *acre* would not have all frontage on Euclid Avenue as a 40 foot lot would have and for the further reason that a 40 foot lot could not be industrialized nor could it, commercially or practically, have a switch on it. Beyond all this, a lot or land fronting on Euclid Avenue and being industrialized and served with a switch upon it up to Euclid Avenue would be a menace to the public welfare and surroundings and to the safety and health of the community.

It should be remembered that Mr. Ambler's testimony was founded on this same basis of being "cut into smaller parcels with switches set in, giving all the smaller parcels track connections." (Page 137) And so, too, was Mr. Witzel's testimony. (page 161)

In the same way it is found that Mr. Ambler's opening testimony at page 135 is based upon this same right to run tracks and to industrialize right up to Euclid Avenue, for he predicated that and all his testimony upon the frank admission of its being "*unrestricted in every way.*" The lessening of value which comes from protecting the public against the liberty to use the land right up to Euclid Avenue "unrestricted in every way" is not such damage as will render this ordinance unconstitutional.

All witnesses conceded (lower half of page 94) that because of the decided elevation of all of the land on the

opposite (south) side of Euclid Avenue (note bottom of page 104), that side can never be used for mercantile or industrial purposes and would necessarily be used for residences alone and indeed much of it is already allotted and privately restricted for that very purpose (pages 100 to 103).

The Court will see that whether having in mind this three and one-half miles of residential hillside on the south side of Euclid Avenue or whether keeping in mind the safety and welfare and protection of all pedestrians, of all travellers and of all people on Euclid Avenue itself or whether having in mind the solid residence streets which were laid out by President Ambler himself and which hem in this present tract on the east, or whether having in mind the solidly built up residence streets which surround the Ambler Company present land on the west, or whether having in mind all of these conditions together —the situation inevitably leads to so plain a result that none could possibly blind themselves to the health, the safety, the welfare, convenience and public good which would be impaired and affected by having *tracks* and *trains* running up to Euclid Avenue or immediately parallel therewith and *factories* on Euclid Avenue.

We submit that when Witness Kunkle took the position and contradicted the above referred to quotation taken from his testimony (page 92 of the Record) he found himself in the dilemma of appealing to the Courts of the United States for relief to be granted to this complainant so that complainant might increase the value of its land by disregarding the health of the community, by invading the safety of its people, by destroying the peace of all of the surrounding homes—to the east, to the west and across the street—by bringing its noise and its menace and its smoke and its rumbles almost up to the doors

of all the surrounding property and up to the side walk of the main thoroughfare of the municipality. And this was the appeal of Mr. Ambler as well.

In this connection, witnesses testified that the danger to inhabitants would be greatly increased if industrial development or tracks were allowed to come up to the north line of Euclid Avenue and examples were given where, shortly outside of Euclid Village, just such conditions now prevail in East Cleveland (having come there before East Cleveland zoned) and only a little further down in Cleveland as well. (See striking examples at concluding paragraph of page 105 and upper part of 196; last paragraph of 110; first paragraph of 111; lower portion of 120; lower portion of 185; bottom of 182 and top of 183; concluding paragraph of 200 of the Record.)

The 620 foot strip was regarded by plaintiff as well as by defense witnesses to be ideal, to act as a buffer and to go far toward protecting the public safety and welfare. (Kindly note their witness at lower part of page 92; 115, 119, 121, 182, bottom and top of 183, lower part of page 185 and 199, 200, 201 of the Record.)

This Supposition did not prove damage.

It is true that when Witness Kunkle appeared before the Notary for the second time he did testify that the Ambler parcel would be worth only one third of another value, but it is to be remembered that he so testified upon an assumed set of facts admittedly *not* provided by the ordinance, for, at lower portion of page 85 he said

> "Taking the Ambler tract of sixty-eight acres as described in the petition, if that acreage as a *whole* were restricted to residence purposes, I would say that its market value would be less than one-third of what it would be for industrial use."

Perhaps this statement influenced the Trial Court to write that "Substantial damage was proved." But if so, it was unfortunate, for the witness predicated this damage upon the basis of the *entire* and "whole" of these 68 acres being restricted to residence; that is, upon a supposition that industry was barred all the way *up to* the railroad track from Euclid Avenue, and upon the idea that residence use was the only use allowed even up to the tracks, whereas industrial use *is* allowed for all but the 620 foot strip bordering Euclid Avenue, which strip was segregated for the protection of the community safety and welfare.

It is true that *if* the ordinance permitted houses alone to be built from Euclid Avenue up to the tracks and if the ordinance forbade Industrials to use the land from the 620 foot line up to the railroad, (all of which was *assumed* as the basis of this testimony), then there would have been a great diminishing of value, for the land toward and near the railroad is not adapted to residence use whereas it is ideal for industrial development, so that such a limitation which was assumed—of a proscription against industry up to the tracks—would have been a limitation unreasonable and unrelated to public welfare needs and therefor that damage would not have been justified by the Police Power.

But as it is apparent that this was but a supposititious set of facts not at all consonant with the situation under the ordinance, we submit it can not form the basis of any finding that "damage had been proved."

The opening paragraph of Mr. Ambler's testimony on page 135, at first blush appears to show a very marked depreciation, but a careful and second reading of this paragraph will show that this testimony of Mr. Ambler was predicated upon the same theory as was that of Mr.

Kunkle to which reference has just been made; for Mr. Ambler was testifying upon the supposition that all of the land right *up to* the railroad tracks was limited against industry and in favor of residence, whereas industry has free play throughout 75% of that land and is proscribed only along the 620 foot strip which is provided as a protection to the public welfare and safety. It is apparent that Mr. Ambler was testifying upon this supposititious condition, for he is contrasting the entire sixty-eight acres unrestricted as against the *entire* sixty-eight acres restricted for residence alone.

In this connection it is interesting to note that Mr. Ambler has here testified that for residence purposes it would be worth but $2000.00 per acre whereas, at the upper portion of page 144 he testified that the residence street laid out by his father—the president of the Complainant company—which lies immediately next to and is located the same as the sixty-eight acres in question, was sold on the basis of $1200.00 per lot, which at the testified-to rate of seven lots per acre, would of itself be $8400.00, rather than the $2000.00 which he pictured in his opening statement on page 135 and that $1200.00 per lot valuation was for some years ago and is concededly substantially greater at this time. Even disregarding this variance in testimony between the two statements of this witness, we submit that if the Trial Court was influenced by the opening testimony of this witness on page 135, it was unfortunate for that testimony was founded upon a *supposition contrary to the facts.*

Value not diminished by 620 foot strip.

Witness Stein testified that all of the occupied Euclid Avenue frontage was taken up with residences alone except at the "Center," and at the bottom of page 102 and

top of page 103 he particularly detailed that there were residences only, along Euclid Avenue east of Chardon Road and up to and beyond Bell Avenue, now East 219th Street. Mr. Ambler, at the bottom of page 136, testified that another twelve acre parcel owned by his father is located between the Nickel Plate track and the rear or north line of these residences which are located along Euclid Avenue and which face along 219th and 221st Streets running quite some hundred feet north toward the Nickel Plate track. This locates the twelve acre parcel between a line several hundred feet north of Euclid Avenue and the Nickel Plate track, so that there is here presented the exact situation which would arise under the ordinance—having a buffer of residences between the north side of Euclid Avenue and the industrial area.

Witness Stein testified that all of this strip so lying between Euclid Avenue and the twelve acre parcel of Mr. Ambler was completely occupied by residences.

It is worthy of note that although Mr. Ambler testified (at the middle of page 138), that this twelve acre parcel would be of less value than twelve acres located where the sixty-eight acre parcel is situated, because the twelve acre parcel lies quite some distance east and out than the sixty-eight acre parcel, and although he gave $10,000.00 per acre as the value of the entire sixty-eight acre parcel if not cut up into small units, he voluntarily (at page 136) conceded $8,000.00 an acre for the twelve acre parcel, though that twelve acre parcel was not cut up into small units and though it lies less advantageously and even though it does *not run to Euclid Avenue* because the strip along and near to Euclid is completely taken up with residences. Considering the fact that this twelve acre parcel is admittedly less valuable because it lies further out in the Village, Mr. Ambler gives to it almost the same value per acre as he

gives to the sixty-eight acre parcel, notwithstanding the fact that the twelve acre parcel does *not go to Euclid Avenue* and that the valuation thereon was fixed by a sale of *several years ago.* This testimony of Mr. Ambler would seem to indicate that in addition to the 620 foot strip being necessary in order to protect the public welfare and safety —as contended by the Village—it does *not* depreciate the industrial land to the north thereof, which quite fully corresponds with the testimony of the majority of the witnesses.

No damage from limitation against Store Use.

So completely was it recognized that there was no present or early requirement or demand for stores or commercial purposes, that there is hardly more than a mention of such uses or purposes. Not a witness referred to any stores except the cluster at the center of the village. Even though substantial areas are allowed for store and commercial purposes, it is admitted that along the Euclid frontage there is not a store other than in the "center" (pages 100-102-103), even though the ordinance *does,* at frequent points, permit stores along Euclid Avenue at locations where, after most careful study and investigation, it was determined that their presence would not be prejudicial to the public welfare.

No witness for complainant tried to show any demand for such sites and the defense witnesses repeatedly testified there was no demand or sale for such purposes (middle of 199, middle of 194, top of 187). There was not and, under the circumstances, there could not have been any proof of damage or confiscation on that score.

In Complainant's brief perhaps it will be told why—though the Trial Court's injunction has freed their land, for almost two years, from the effect of the ordinance and

though this Appeal under the Federal Practice did not suspend the injunction—no store or commercial or factory building has been built on plaintiff's land along or near to Euclid, and why no such structure has ever been built anywhere on or near to Euclid Avenue since or before the injunction, even on the frequent areas along Euclid Avenue allowed for store and similar commercial uses.

In this connection the Court will see how little Mr. Ambler thought of store use when he put this valuation at only $100.00 a foot with a 200 foot depth (middle of page 136) and when he spoke of the lack of demand for store purposes (middle of page 137). Mr. Ambler's store valuation was no greater than that for residences as placed by other witnesses, because he recognized that there was no demand for use for such purposes. These admissions certainly did not prove damage nor render the ordinance unconstitutional.

What he and his chief witness, Kunkle, were contending for was not for store or similar commercial uses, but for the right to *industrialize* right up to Euclid Avenue and to bring switches and tracks up to and parallel with Euclid Avenue—regardless of the injury to public health, safety and welfare.

We urge that there can not be pointed out any clear or convincing proof of damage in respect to store use either. But even if there had been such proof, that of itself would not have rendered the ordinance unconstitutional if such damage is the result of a reasonable exercise founded upon protecting of the homes which constitute the only class of structures along the entire Euclid Avenue and along all streets leading therefrom, (except at the "center").

The only other witness who testified on behalf of the complainant in reference to values, was Mr. Chase

Witzel. Who can read his testimony on page 155 and the upper portion of 156 and arrive at any certainty or be pursuaded that there is any confiscation or damage?

A reading of this testimony would appear to indicate that this complainant's witness may well be said to have placed a higher and *greater* value upon the complainant's land with the ordinance in effect than without the ordinance applying. (Kindly read lower portion of page 162 and all of 163.)

This witness for complainant appears to have demonstrated at bottom lines of 154 and at upper half of page 155, that if the regulated 620 foot strip between the industrial area and Euclid Avenue were allotted and used for residence purposes as provided by the ordinance, it would bring $25,000.00 an acre. This is more than any witness—plaintiff's or defendant's—valued this land if used for industrial or commercial or store use. (Except Kunkle's valuation of $44000.00 for a 40 foot Euclid Avenue lot if a switch went up to Euclid Avenue.) This witness—Mr. Witzel—valued the Ambler parcel, unrestricted, at $8500.00 to $10000.00 per acre (page 149) and here, for residence purposes he valued it at $25000.00.

This did not justify the finding; "That substantial damage had been shown." Can anyone say that this witness's testimony distinctly or clearly proved confiscation?

These three witnesses—Kunkle, Ambler and Witzel—were the only ones who testified for the complainant in reference to values as affected by the ordinance. Is it possible to come to a conclusion to the effect that any or all of these three witnesses proved damage unrelated to the public safety and welfare? And in this connection it is to be remembered that the duty of clearly proving and establishing confiscation, is a burden which rests upon the complainant.

We are to be reminded that the Trial Court did not see or hear any witnesses as it had no more than the record before it.

Beyond all this, may we take the liberty of saying as stated in other parts of this brief—that even if a lessening of the value were to have been proved, that would not necessarily invalidate the ordinance (*Chicago and Alton Railroad vs. Traubarger*, 238 U. S. 67; 239 U. S. at page 410—*in re Hadachek*).

The Defendant's PROOF of INCREASED Values and benefits from the Ordinances.

In addition to the concessions and the admissions of complainant's own witnesses and in addition to the apparent lack of proof of confiscation, there is the testimony of the defendant's witnesses to the effect that the value of the complainant's land is increased and enlarged by virtue of the ordinance itself.

Former Lieutenant Governor William Greenlund—recognized as one of Cleveland's outstanding realtors—gave a clear computation and very convincing testimony in the concluding paragraph of page 180 and the first paragraph of page 181 wherein he testified as follows:

> "If, under the Zoning Ordinance of the Village of Euclid, there are 750 feet reserved from that same tract of land, fronting upon Euclid Avenue, for residential purposes, the value of the balance from the zoning line north to the Nickel Plate track, the industrial property, I think, would be increased in value, because you are restricting, first the number of acres that can be used for that particular purpose. The increase in value might not come at this time, but it would come at some time in the future. I would say that the fair market value of the Euclid Avenue frontage throughout this section, say back 150 feet, would run something

between $75.000 and $100.00 a foot, for residence purposes. In my judgment, the value of the remaining property within the zone limits, north of the 150 foot line from Euclid Avenue to the 750 foot strip, exclusive of improvements, because those would be paid for anyway by the man who buys the land or buys the lots, would run from twenty to twenty-five dollars a foot up to something in the neighborhood of thirty to thirty-five dollars a foot, the closer you are to Euclid Avenue.

Reducing that to value per acre, first on the Euclid Avenue frontage, using 40-foot lots as a basis, and seven lots to the acre, 40 by 150—it is not necessary to make them that deep, but it would run fairly close to seven lots to the acre—it would run at the rate of *$21,000.00* an acre. The rear of the property, and I am taking only an average there of $30.00, which I think is low, and the lots would be about the same number per acre, would run about $8,500.00 per acre, and by the rear of the property I mean the property in the rear of the Euclid frontage, back to that 750-foot line, whatever that may be, that arbitrary line,—it would be in the neighborhood of $8,500.00 per acre. In my judgment, if that property were zoned by establishing first a line back across east and west through the property 620 feet, and devoting that to residence purposes, restricting it to that purpose, and then 150 feet restricting that to residence purposes and office buildings of any manufacturing establishment that might be located on the ground north of it, *I don't think there is any question about that increasing the value of the industrial property north of the 750-foot line to the Nickel Plate track.* (In my judgment that property would not be damaged to the extent of $150,000.00 if those zone lines were adopted and maintained and established.)"

We have placed these last few lines in parenthesis because on page 165 of the complete testimony before it was put in narrative form, the following occurred:

"Q. In your judgment, would that property be damaged to the extent of $150,000.00 if those zoning lines were adopted and maintained and established?

A. Not in my judgment, no."

From the earlier lines of the quotation from the narrative form, it is evident that Mr. Greenlund was *not* admitting that there might be some loss but that it might be less than $150,000.00; and yet, in order that there may be no possible misinterpretation of the concluding lines of this narrative form, we have made this explanation, for the narrative form is quite possible of misinterpretation at this point.

In the above quoted testimony Mr. Greenlund indicates not only by statements but by actual figures that if the Zoning Ordinance is followed it will make the complainant's land worth not merely what is the highest estimate offered by the complainant's witnesses but will very substantially increase and enlarge even that maximum value. (Also see upper portion of 182.)

This witness fortified his position by reference to the requirement for the supply of labor, the protecting of the community against the damage arising from the so-called "mixed" development which would result if the ordinance were not effective and by further evidence to the effect that the sale of the land would be not merely at a much greater figure but in a much shorter time than if the complainant were to be allowed freedom from the ordinance. (Kindly note middle of page 186, bottom of 182 and top of 183, bottom of 183 and top of 184, upper portion of 194.)

In the same way the defendant's proof given through Mr. Stein (Bottom paragraph of 131, third paragraph of 132, and particularly in his testimony which reaches down to the bottom of page 128) clearly indicates that the complainant would be *benefited* by virtue of the ordinance rather than be a loser thereby.

Beside the convincing evidence of Greenlund and Stein, there is the testimony of Laronge. If one will but read just below middle of page 197, last paragraph of 198 and just above and below middle of 199 of this witness's testimony, one is compelled to the conclusion that here is to be found distinct evidence against any claim to the effect that the complainant's property is damaged or is being confiscated by virtue of the ordinance.

Notwithstanding this array of testimony of plaintiff's and defendant's witnesses, the Trial Court wrote at the lower portion of page 308 of 297 Federal Reporter:

> "None of the important or controlling facts are in dispute, with the single exception of the extent of that damage; but even here there is no substantial denial that this damage is not only in excess of the jurisdictional amount but is substantial."

We believe that there was no genuine proof of any damage and that there was much proof of enhancement of value accruing to Complainant's land by virtue of this ordinance. We submit it is hardly correct to say: "There was no substantial denial that this damage is not only in excess of the jurisdictional amount but is substantial." The *only* damage which was put in evidence was founded upon a plan highly and plainly injurious to the public safety and welfare—Tracks and switches up to Euclid Avenue and factories thereon.

LABOR SUPPLY.

An important feature which occupied the attention of the inquiry before the Notary Public, was that phase which concerned itself with the general welfare being improved and best served if the community were to have space and room for the proper and uncongested and nearby housing of the Labor Supply which will ultimately be needed in order to man and operate the factories and

industries which may find it possible to locate in the vast tract of more than 1400 acres which has been designated for industrial purposes within the Village of Euclid.

Not merely the witness for the defense, but the complainant and its witnesses united in assertions to the effect that it requires approximately five times as many acres in which to properly and sanitarily house the people as is required for the factories and Industrials which will require the services of these people.

The figures presented by the Village Engineer, Mr. Fred Pease, and the testimony offered by Mr. Ambler, by Mr. Kunkle and by Mr. Witzel for the complainant, all went to show that more than 1400 acres was unrestricted and available for factory and industrial purposes, whereas the entire Village (*including* the streets and parks, Municipal Buildings, Churches, schools and already built up territories) constituted a total of approximately 7400 acres.

The complainant's witnesses conceded that this was a proper and welfare-serving ratio, because it resulted in the ratio of approximately five to one (7400 to 1400), which is the generally accepted ratio most desired. (Kindly note: Upper half of page 94 of the Record, Kunkle; bottom of 111, 112 and 114, Whitten; Ambler's own testimony on page 143, all in printed Record).

It was exactly the *ideal* ratio which was attained by this ordinance.

The complainant and its witnesses conceded that such a proper balancing of labor supply would result to the benefit of and would *enhance* the value of the industrial and factory land itself. (Please note bottom of page 90, Kunkle; upper part of 110, bottom of 115 and top of 116, bottom of 119 and top of 120, Whitten; pages 180, 181, 182 and 186, Greenlund; all in printed Record).

Under these circumstances the Village feels that it is justified in pointing out that in addition to the many features of this ordinance which have already been shown as being related to the safety, health and welfare of the community, this particular provision is an additional evidence of the close relationship between this ordinance on the one hand and a greater public welfare, and more healthful conditions on the other hand and it shows an increasing value for the complainant's land.

Why set back provision was adopted.

Investigation brought forth the statement from long experienced fire authorities, that the most reasonable and certain way of preventing widespread conflagration is by requiring the greatest possible distance between buildings and structures on one side of each street and those on the other side thereof, commensurate with a reasonable use of the land. (Kindly note fire chief Ballou's testimony in the concluding lines of the first full paragraph of page 123 and page 207.)

The municipality did not have the right to do this so far that it would be charged with confiscating the land along the front of each street, but it was felt that it not only had the right but that it owed the duty to create this setback line as a very manifest exercise aimed for the safety and general welfare of the community. It was felt that to do less would be unwise. Such protection and preventative measures are appropriate and proper even where there is an adequate supply of water and more so where the supply is inadequate. In Euclid Village the two great railroad highways traverse the entire length of the municipality and here, especially throughout the dry season, the sparks from the locomotive add to and increase the danger and create a greater possibility for an unchecked and village-wide fire.

May we refer to the fact so generally known as to be within the realm of Judicial Cognizance—that each year witnesses great sections of large cities and almost the entire area of smaller municipalities completely destroyed and laid to the ground by devastating fires which it is found impossible to check and control because the flames and more particularly the heat leaps from one side of streets to the opposite side and from block to block, whereas much of this could be prevented and lessened if there were greater spaces between the buildings on one side and those on the opposite side of the thoroughfare.

This set back provision was not for the purpose of obtaining land for street widening or for any purpose of Eminent Domain. There was no allegation or proof thereof but the contrary was shown. (Middle of 105.)

PROOF SHOWS EUCLID AVENUE NOT BUSINESS OR INDUSTRIAL STREET IN VILLAGE.

In considering the action of the council in the passage of the ordinance, it must be borne in mind that except at the junction of Chardon Road and Euclid Avenue (which is the so-called "Center" of the Village) there is not an industry or store or place of business of any kind along either side of Euclid Avenue; in other words, there is not a single business along this seven miles of Euclid Avenue frontage, figuring both sides of Euclid Avenue, except this one cluster of stores, so that the claim that Euclid Avenue at the present time through Euclid Village is a business street is not justified. (See 5th to 10th upper lines of page 187; bottom of 103; third paragraph on page 100 and middle of 171). And every building along this seven miles of Euclid Avenue is a *residence* excepting this small cluster of stores at the Center of the Village, and this is true though Euclid has eight to ten thousand

inhabitants (page 103). And yet the Trial Court, at page 309 of 197 Federal Reporter, wrote:

> "From the public square in Cleveland * * * including spots in and beyond Euclid Village, Euclid Avenue has become the great business and Commercial street of the metropolitan area of Cleveland and such, the evidence shows, is its natural, obvious and ultimate use within and beyond the Village of Euclid."

We respectfully submit that this may be its *ultimate* use, but we earnestly do not feel that the proof showed that this was its *present* use. Indeed, as to the "natural and obvious" use, we need but refer to the plaintiff's principal witness who, at the last paragraph of page 92 of the Record, plainly said:

> "The *natural* and *logical* way for development of that property immediately north of Euclid Avenue (and the Supreme Court now knows that is where complainant's land is located) is by allotment for workingmen's homes. I believe it is desirable to have a workingman's home so near this development of property there; I believe that is the *best* place they could put them." (Italics supplied.)

And this was re-affirmed by the defense witnesses—Greenlund at middle of 181; Laronge at just above and below middle 199; Stein at 128.

In this connection it may be well to point out to the Court that even though some other limitation of this 620 foot strip might appear to be a wiser limitation, yet the wisdom or lack of wisdom of the present limitation is not to be determined by legal proceedings, if there is any relation between the regulations as now established and the safety and health and general welfare of the people at large. This is the established doctrine as shown in the latter portions of this brief.

If at any time in the future, the present conditions as to the frontage of Euclid Avenue change and render it more desirable from the standpoint of the interests of the owner as well as the safety, comfort and general welfare of the people, the Court may properly rely upon it that council, acting in the interest of the people, will again exercise the police power to meet such change by amending the restrictions; but the council had before it in the passage of the ordinance a certain condition and has drawn the restrictions in accordance with that condition which, in its judgment, *now* meets the best interests of the people under the limitations fixed for the exercise of the police power.

Though Railroads have been there for all these years, there are only 16 industrials in total, and not one has built along or near street line.

The Bill of Complaint makes reference to the fact that the New York Central Railroad was built about 1850 and the Nickel Plate Railroad was built about 1880 and that these two lines have, ever since such respective dates, run from the most westerly to the most easterly limits of the Village of Euclid.

Though these railroad facilities have been in existence and available for the respective periods of 75 years and 45 years, it is a fact that there are but 16 industrial plants in the entire Village of Euclid, notwithstanding that these railroad facilities of these two prominent railroads have afforded opportunity for the building of such plants for more than a half century. And in this number of 16 industrial plants, is counted even the most humble and smallest so-called industrial.

It is a further fact that not one of these industrials has been located so near to Euclid Avenue or so near to

St. Clair Avenue (which parallels the New York Central line about 1600 feet north of the Lake Shore Railroad) as the ordinance itself permits. (See Mayor Zimmerman's testimony at middle of page 171 and Inspector Stein's at lower portion of 103 and Mr. Ambler's admission at 14th last line of page 141.)

Each industrial has, of its own accord, chosen to build nearer to the railroad than allowed by the ordinance.

The industrial plants have, by their own example demonstrated that they are most advantageously located when *close* to the railroad tracks, and the location of each and of all of these industrials, proclaims the fact that not one has chosen, during all of this half century or even during the great industrial expansion of the last six years, to build so near to the street lines as the ordinance itself permits.

We bring this to the attention of the Court, at this time, because we believe that it has a persuasive effect in reference to many of the assertions which may be contained in the Brief of the Plaintiff.

Most of Village Homes in this Territory.

Referring to Plaintiff's Bill, the liberty is taken of saying that, contrary to the assertion of the Plaintiff that:

"The land in said Village north of Euclid Avenue has no special usefulness or adaptation to residence uses, except immediately along the Lake Shore," it is to be pointed out that the President of the Plaintiff Company allotted and restricted, for the purpose of residences alone, Mr. Ambler's own land, which parcel so allotted and so restricted is, in no way different from or located otherwise than the part which the Plaintiff now continues

to have. The part allotted by the complainant's president lies exactly the *same* as the parcel described in the Bill and is, in every respect, identical therewith. (Kindly note the 2nd paragraph on page 147 as testified by Ambler himself; the 34th and last paragraphs one page 101 and the upper third of page 102 and particularly the 10th and 11th lines of page 104.) It is not conceivably true that the territory claimed by the Bill to be unsuitable for residence use is really thus unsuitable for within that very territory lies the greater portion of the population of the village and within it are located the far greater portion of its homes and residences. (See pages 100, 101, 102 and 103.)

In addition, it is to be remembered that *every* building (except those at the so-called "Center" of the Village) located on either side of Euclid Avenue is a *residence* and in the allotments which run northwardly off of Euclid Avenue toward the Nickel Plate track and in the allotments on the hillside which run southwardly from Euclid Avenue, there are hundreds of houses, so that when the Plaintiff asserts in its Bill that the Euclid Avenue frontage "has no special availability for residence purposes" it apparently again asserts what its own president's conduct and what countless houses and unbroken residence streets indicate to be contrary to the facts. (See pages 100, 102, 103, middle paragraph of page 171, 34, 30, 29.)

Explanation of "Uses."

Uses 6, 5, 4 and 3 as indicated upon the map and in the Ordinance, permit of industrial and factory and commercial and allied purposes.

ALL land between St. Clair Avenue and N. Y. C. R. R. is open to and is unrestricted as to industrialism.

All of that great territory lying between the southerly side of St. Clair Street and the northerly side of the New York Central tracks is free and open and unrestricted territory for the development of industrial construction, except as to the few necessary minor exceptions hereinabove just referred to.

Approximately 98% of all the land lying between the south side of St. Clair Street and the north side of the New York Central tracks, is free and open to industrial development. (See Defendant's Map, Exhibit 2.)

And this is true in reference to all of that vast territory from the most westerly limits of Euclid Village to the most easterly limits of the municipality—3½ miles in length. (See page 126 of the Record.)

The other 2% is justifiably and necessarily restricted.

As to this vast extent of territory, so lying between St. Clair Road and the New York Central tracks, it must be apparent that all of the land which could possibly or reasonably be used for industrial purposes, has been left open and unrestricted for industrialism.

As to Land BETWEEN the two Railroads—100 Per Cent. allowed for Industrialism. Not a single plant has availed itself of right to build in this great Stretch of Territory.

Stepping then, across the New York Central Railroad line and walking toward the south, we come upon a great stretch of territory which lies *between* the south side of the New York Central Railroad and the north side of the Nickel Plate Railroad.

This territory of land has an average width of about 1600 feet and is bordered, on the north by the New York Central line, and, on the south, by the Nickel Plate Railroad. (Page 126, Engineer Pease.)

Again adverting to the dates set forth in the Bill of Complaint, it is to be pointed out that—except where the three intersecting (north and south) streets cross the railroad track, not a single industry of any kind or of any size has ever availed itself of the unrestricted opportunity to build in this great area which lies *between* the Nickel Plate track and the Lake Shore track which territory is three and one-half miles in length, making a total of seven full miles of unbroken Railroad frontage or 100% of all available land here. (Their witness—Witzel—at middle of page 160; the Inspector at second paragraph of page 109; Engineer Pease, 126; 2nd and 3rd paragraph of page 30.)

As to land SOUTH of Nickel Plate R. R.

Stepping across the Nickel Plate tracks, from the north to the south side of these tracks, we are confronted with another stretch of land which has an average but variable width of about 1800.

All of this land except the 620 foot strip or belt which faces immediately on the north side of Euclid Avenue and except where residences and buildings and streets are now located, is free and open territory for industrial purposes and for purposes accessory to and used in connection with manufacturing and industrial pursuits and that is true throughout the entire length of the Village except where intersecting buildings or streets have already been constructed. (Defendant's Map, Exhibit 2 and page 126.)

These three parallel stretches of land which we have just pictured—running throughout the *entire length* of

the Village—constitute all of the land which could reasonably be used or which is logically located for use for industrial purposes, and of this, 91% of the land now unoccupied is open to industrial and commercial uses. (Page 126)

98 Per Cent. is allowed for light and heavy manufacturing, north of N. Y. C. R. R. 100 Per Cent allowed between the two R. R's.

In one stretch, the ordinance permits industrialism to have 98% of the land and the 2% restriction is so manifestly necessary and required, that even the Plaintiff will not endeavor to quarrel with or to question that 2% restriction where these particular spots or locations appear or occur; while the full 100% is allowed between the two Railroads.

75 Per Cent. is allowed South of Nickel Plate R. R.

As to the stretch of land between the Nickel Plate track and Euclid Avenue, the ordinance permits a full 75% of the unoccupied and available land to be used for industrial purposes, through the entire length of the village. (See bottom of page 126 of the Record.)

The Bill of Complaint does not Square up with the Facts.

Is it not a fact that the Complaint of the Petitioner would lead a reader to believe that the limitations of this Zoning Ordinance have practically ostracized industry from the village and ousted industrial plants from the very territory where they ought reasonably and properly be permitted to be located?

The allegations in the Bill to the effect that there is an insufficiency of industrial land in Greater Cleveland and that therefore Euclid does not have the right to exer-

cise its Police Power was, patently, an assertion with no legal merit, but even if this picturization had been worthy in law, it met its complete repudiation in the proof, at middle of page 120, at 180, 186, at upper portion of 130 and at middle of 200 and their witness at lower half of 86 of the Record, all of which showed great acreage available in every direction about Cleveland.

If the Bill had been in keeping with these and other facts, Defendants would have been able to raise the Basic question of Constitutionality upon a Motion in the nature of a Demurrer and thus all testimony could have been spared. As it was, the defendants were compelled to right the misimpressions.

The great total of 14 miles of Railroad is freely and unrestrictedly allotted for industrialism.

It might be well to conclude by making the statement that the railroad frontage, in total, allowed for industrialism in Euclid Village under the ordinance, constitutes approximately *fourteen* (14) *miles* in length, comprising *1400* acres—an unusual amount. (Page 126)

A quarter century of building will hardly witness more than a mere "settlers entry" to this great territory of land which is open and available under the ordinance, for industrial development.

Statistical computations show that an average factory occupies, for itself and for its appurtenances and for its accessories, less than an acre of ground—room for more than 2000 *ground* floor factories is thus afforded in Euclid Village. In what other village are 2000 ground floor factories found?

But the Bill of Complaint alleges, in the face of all these facts:

"In effect this ordinance seeks to erect a dam and hold back the flood of industrial development, and by destroying all the value in land in the Village which arises out of its manifest availability for industrial development, forcibly changing the character of the Village."

Much of Complainant's Evidence irrelevant. Euclid Village has right to legislate for own needs.

Much of the complainant's proof relates to factory development far removed from the Village, in Cleveland (see lower portion of page 69 and top of 70; middle of 71) and in East Cleveland, and should be disregarded, except perhaps to show that there may be some tendency of this character toward the east. So, too, the Aerial Map offered by complainant is irrelevant in main.

But in the territory involved in this action under the zoning ordinance, to-wit, that stretch lying between Euclid Avenue on the south and the Nickel Plate Railroad, the proof shows that in this great stretch of over three and one-half miles there are only seven industries, including lumber and small coal yards. (Page 99 and top of page 100)

And each one of these industrial plants—even the smallest—is adjacent to the railroad and further removed from Euclid Avenue than is required by the Ordinance itself. (Last full paragraph on page 103)

Euclid is 9 1-2 to 14 miles from Cleveland

A: As stated in our Answer, Euclid—in the true sense—is not next to Cleveland but is merely next to a peninsula of Cleveland, for between Euclid and Cleveland's main land, lie the long and built up stretches of East Cleveland (several miles long) and of Bratenahl on the north (several miles in length) and then over a mile of Cleveland

Peninsula also intervenes. (See first paragraph of page 24 and 124.) The westerly or nearest line of Euclid Village is about 9½ miles from the Cleveland Public Square and its easterly line is the County line and is almost 14 miles from Cleveland's Public Square. Euclid is the most remote municipality from Cleveland, in Cuyahoga County.

B: Furthermore, it is respectfully submitted that so long as Euclid Village does nothing to injure Cleveland (such, for example as polluting Cleveland's water), Euclid has the full right to legislate in and to control within its own bounds as it deems best.

Indeed, Euclid could not legally legislate *beyond* its domain. Equally, then, Euclid can and may legislate *within* its domain as it deems best for its own safety and health and general welfare.

In connection with Euclid's right to legislate for itself and within its own bounds, we refer to: Article XVIII, Section 3 of Ohio's Constitution, which reads:

> "Municipalities shall have authority to exercise all powers of *local* self-government and to adopt and enforce *within* their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

It must be quite evident that the recitations in the Bill and the attempted proof offered by the Complainant (as for example the lower two-thirds of page 69 and top lines of page 70) are irrelevant and of no pertinence in so far as they recite the need of Cleveland for more industrial land and in so far as they refer to locations of factories in Cleveland and not within the Village of Euclid.

The alleged need (though it really does *not* exist) in Cleveland for more factory land, can not control or bind Euclid. (Pages 180, 191, 200, 120, 130 of the Record show the very large acreage in and about Cleveland available for industrial use.)

ARGUMENT.

THE PHILOSOPHY OF ZONING.

The Euclid Ordinance is a comprehensive one, in that it covers the *whole* territory of the village, it divides that territory into use, height and area districts, each with its designated standards of use, heights and area, all based on a comprehensive survey of existing conditions and tendencies and estimates of the future needs of the community in the way of residential, business, industrial, recreational and civic developments.

There are many types of ordinances which are erroneously referred to as zoning ordinances. Confusion results from failing to distinguish between the constitutional basis of these other types. It is noteworthy that neither in most adverse briefs nor in adverse arguments do those opposed to Zoning Ordinances, cite cases in which a Zoning Ordinance, in the *true* sense of the term, has been involved. Error alone, however, can result from failing to distinguish the constitutional questions involved in a zoning ordinance on one hand and, on the other, ordinances regulating the use, height or area of buildings within certain blocks or streets or intended to merely maintain the exclusiveness of some selected part of a city.

For example, a very customary type of ordinance is one that seeks to protect existing residential blocks or neighborhoods, by defining what is a residential area and prohibiting certain designated businesses or industries in that *one* block or in that one territory. This sort of ordinance is more properly termed a "block" ordinance; but it is not zoning. It does not district the *whole* city by means of a map, allotting each type of use to its most appropriate territory for the *welfare,* safety and health of the community. In effect, such an ordinance permits the existing residential users of any neighborhood to dictate

the future use of that neighborhood, even though a comprehensive survey of the city's needs might demonstrate that neighborhood as one which should be open to non-residential uses. In other words, instead of being—as the zoning ordinance is—a comprehensive distribution of the whole territory of the community among all the different uses, each with appropriate standards of height and occupancy, from the point of view of community results in the way of *health, safety* and *welfare*, the block ordinance simply—perhaps arbitrarily—fastens down the existing use of selected neighborhoods; thus, in effect, permitting the existing users to exclusively decide for what purpose the undeveloped property in their neighborhood may be used. It will be found that most cases of building regulation cited by those opposed, involve an ordinance of this "block" type and not a zoning ordinance; and in most of these cases there was the additional element that the regulation was made conditioned upon the voted consent of property owners, thus introducing a question of delegation of legislative power, or of whim and caprice.

Again, there are ordinances which prescribe a maximum height limit generally *throughout* the entire city, without any attempt to intelligently survey the whole territory of the community, without any estimate of future needs in the light of fire, congestion and accident situations and without effort to adapt the height restrictions in the various districts to these needs. This sort of ordinance may or may not be constitutional, but it is at least arbitrary as compared with the comprehensive zoning ordinance, which carefully adjusts height limitations to a carefully wrought plan of districting and to a fully considered plan aimed and designed to prevent present and future accident and congestion contributing conditions and aimed and enacted solely for the safety and *welfare* of the *community*.

Such a comprehensive ordinance and survey and study is exemplified by the reports of the New York Commission which so carefully studied the entire New York City situation—just as was done in Euclid Village—before the Zoning Ordinance was enacted. Please see last paragraph of pages 71-72 and 73; the lower part of pages 27 to page 32; page 56 and upper part of 57, of "The *Partial* Report of the Commission" of New York, under date of December 1913, and pages 3 to 5 and Chapter II, pages 6 to 14, and the Chapter on "Use Districts," pages 15 to 25 of the *Final* Report of the Commission on Buildings, Districts and Restrictions, of New York, under date of June, 1916. These pages are very illuminating and are valuable contributions of thought, data and expression. Copies of these two Reports have been sent to the Clerk in order that the Court may the more conveniently refer thereto. May we invite the Court to the last paragraph of page 29 and pages 30 and 31; "Necessity for Districting" on pages 56 to 59 of the Final (1916) Report. The organizations which approved these Use and Districting Regulations are most interesting—pages 73 to 76; the Statement of Thomas Addams, Town Planning Advisor, Commission of Conservation, Ottawa, Canada—as set forth on pages 77 to 80 is a scholarly and worth-while discussion and in it Mr. Addams sets forth the need of these regulations *before* the municipality is built up and before the welfare and safety conditions have been thwarted; page 89 describes the ills in respect to distances which workers must travel because the labor supply is far from the improvidently located factories; pages 88 and 90 show the resulting street car and vehicular and sidewalk congestion; the suburban situation is pointed out at the bottom of page 93; Juvenile delinquency is linked up with a lack of districting and regulation in the interesting statement of Ernest K. Coulter, Superintendent of

The New York Society for the Prevention of Cruelty to Children—found on pages 99 and 100; the diminution of accidents resulting from a Zoning Ordinance is apparent from the contribution of Edmund Dwight of the Employers' Liability Assurance Corporation, which appears on pages 101 and 102; Abram I. Elkus, former counsel for the State Factory Commission, on pages 102 and 103, offered a version as to Zoning Ordinances and districting which is worthy of being read; Dr. Haven Emerson, Commissioner, Department of Health, at pages 106 and 107 as well as on pages 8 and 9, emphasized the need of Zoning and Districting; Mr. George C. Whipple, Professor of Sanitary Engineering, Harvard University, at page 10, spoke of the effect of keeping industry and trade from residential sections. His Statement is but a very few lines but it is a unique summation of the subject. No less brief and interesting is the paragraph quoted on page 10 from Dr. G. F. Boehm, neurologist. The beneficial effect of use districts by way of segregating different kinds of traffic, the need for Zoning and Districting, the increased cost of streets resulting from lack of Zoning, the development of slum areas attributable to the absence of Districting, the ill effects—by way of danger—resulting from stores in residential streets, the increased freedom from fire dangers which would result from Zoning and the stabilizing of land values are splendidly portrayed, on pages 143 to 147, by Mr. Nelson P. Lewis, Chief Engineer of the Board of Estimate and Apportionment. A reading of this Final Report of The New York Commission and a study of the many photographs can hardly fail to convince the reader of the need for Zoning, of its importance before a municipality is too built up and of the intimate relationship between Zoning and the Health, Safety and Welfare of the community.

This brief is restricted to the comprehensive type,—that being the type which is involved in this case,—enacted for the sole purpose of defending and providing for the Safety and General Welfare of the Community.

The word "Zoning" is perhaps unfortunate in that it may convey the idea of large, more or less concentric zones. "Districting" would be a more accurate term. In the *comprehensive* plan, the whole territory of the municipality is divided into districts, some of which may be large, some as small as one block or one side of a block, each with its own standards of use, height and occupancy, each selected by virtue of the consideration of the *community* health and general welfare as applied to that particular district; the whole constituting a comprehensive plan for the best manner of conserving and assuming the greatest safety and welfare of the *whole community.* Existing uses of a district are taken into account, but are not necessarily decisive. The *comprehensive* plan is obviously more reasonable than any "Block" ordinance.

REASONABLENESS IN THE PREPARATION OF A COMPREHENSIVE ORDINANCE.

We do not mean to say that every ordinance which covers the whole territory of a municipality and divides it into use, height and area districts is necessarily constitutional, regardless of whether it was arbitrarily or intelligently worked out. If the preparation of the ordinance be attended by no survey of the existing situation, no attempt to study the city's problem, no attempt to adjust the provisions of the zone plan to the city's needs in the way of health, safety, prosperity, welfare, and the like; but be simply a piece of guess work, then such an ordinance might not be reasonable; for "reasonable" in constitutional law, means that there has been a genuine at-

tempt to apply the processes of intelligence to working out the accomplishment of the purposes of the measure. The evidence in the case at bar, however, clearly shows that there was such a conscientious, thorough, unprejudiced, careful work of study, investigation, survey and inquiry in the Euclid Village ordinance. The plaintiff has introduced no evidence to show that it was arbitary in the sense of absence of care or absence of genuine application of thought. (Pages 167, 168; lower half of 205 and upper half of page 206; upper half of 39 and upper half of page 41 of Record)

THE QUESTION OF CONFISCATION.

Nor do we mean to say that even in a comprehensive ordinance a particular provision as applied to a particular piece of property might not be unconstitutional because unreasonable in its application. On the question of unconstitutionality of zoning, however, the element of confiscation is quite confusing. For example, a particular tax may be confiscatory and for that reason may be invalidated in an action involving the collection of the tax; but that fact does not demonstrate the non-existence of the *power* to tax.

A particular rate imposed on a particular utility is sometimes invalid because confiscatory; but that does not mean that the legislature has no rate-making *power*. Similarly, a particular zoning provision may be confiscatory as regards a particular piece of property; but that cannot mean that the community has not the power to zone. This factor of confiscation may be an issue in some cases; but it cannot be an issue or useful in determining the question whether zoning falls within the constitutional scope of legislative *power*. That a legislative power may be abused to the point of confiscation does not disprove

the *existence* of the *power;* and this is as true of zoning as of taxation or of any other type of legislative power.

The complaint of confiscation is usually based on a "begging of the question."

In considering the charge of confiscation, which is so easily made and so habitually used by those who attack and resist legislation, one fallacy is to be avoided—a fallacy into which we believe plaintiffs have fallen. We refer to that begging of the question which consists of disproving the existence of a legislative power by assuming a right to be free from such legislative power. The question before us, for instance, is whether the community has the *power,* in a zoning ordinance, to restrict property to certain uses for the purpose of protecting and best assuring the health, safety and general welfare of the community.

To contend, as plaintiff seeks to do, that there is confiscation or damage because the property was acquired for a non-residential use and that that purpose of acquisition would be impaired, is a begging of the question, if the limitation is for the public welfare, health and safety.

One cannot speculate upon a community's not exercising its constitutional police power and then claim unconstitutional destruction of property rights when the community does exercise its constitutional police power.

The individual cannot, certainly by its selection of property for investment, determine whether or not the community shall or may exercise its constitutional legislative powers. Every statute relating to property creates some change in the manner in which such property may be used or developed and in the financial results of its ownership or use.

To call change confiscation, would be to deny all legislative power over property. To contend, as plaintiffs seem

to do, that future speculative value of their property for industrial purposes is entitled to freedom from all legislative treatment, is arguing in the same sort of vicious circle and is a begging of the question just exactly as the now discredited claim that a new public utility rate, imposed by legislation or commission, is confiscatory when it deprives the utility company of a fair return upon a franchise value representing the capitalization of the company's earning capacity under the old rates. In the language of the Supreme Court in a utility case,

> *Cedar Rapids Co. vs. Cedar Rapids,* 233 U. S. 655, 669:
>
> "If the franchise is taken to mean that the most profitable return that could be got, free from competition, is protected by the 14th Amendment, then the power to regulate is null."

Similarly, if the maximum possible future value of unregulated property may not be interfered with by law, then all legislative power over property would be destroyed.

Whatever "confiscation" may mean in the constitutional sense, it cannot refer to that effect on future or speculative or even present values, which is a necessary incident to the existence of the police power. Nor is substantial depreciation of present value necessarily confiscatory, as appears from countless cases arising under the police power, of which we cite only *Hadacheck vs. Sebastian,* 239 U. S. 394, where the evidence tended to show a possible depreciation of $300,000.00 in the value of land used as a brickyard as compared with its value in the event of the exclusion of such use (the land having been placed in a residential district), and nevertheless the Supreme Court of the United States upheld the decision of the lower court. This attempted issue of confiscation

would appear to be irrelevant and confusing in connection with the question of the *constitutionality* of zoning; and, we believe, as hereinbefore pointed out under the "Facts," that confiscation was not demonstrated as being the effect of the Euclid Village ordinance on the present value of plaintiff's property.

What PROOF of damage or confiscation?

We beg the privilege of concluding this particular subject by repeating what we have hereinabove stated—that though confiscation would not prove the lack of the *power* to zone and to legislate, and though confiscation is quite irrelevant to the subject of the right and power to so legislate—yet even if confiscation were relevant as to the power to enact this ordinance, there is no clear or convincing proof of confiscation. On the contrary, the proof on the part of the complainant's own witnesses and the testimony offered by the witnesses for the defense must be said to have robbed the complainant of the right to claim that this ordinance results in any damage or confiscation of complainant's property or values.

One needs but to read the simple and plain admission of their chief witness (Kunkle) toward the lower portion of page 92 of the printed Record and the testimony to which reference was made earlier in this brief under "Facts," to find convincing answer to any allegation of damage or confiscation; concluding lines of page 92, middle of 93, concluding paragraph of 180, top of 181, upper part of 182, middle of 186, upper part of 194, 128, 131, 132, 197, 198 and 199.

If this be true—and we earnestly believe it to be so—then the question of the reasonableness or the unreasonableness of the particular line established by the ordinance is really foreign to the issue.

THE BASIC QUESTION.

Otherwise worded, the issue is really freed from the question of the reasonableness or unreasonableness of the particular restriction and the subject really narrows down to the sole and completely *legal* and *fundamental* question as to whether there be a *constitutional power* to enact such ordinances as the one in question.

Frankly, this is the question which countless people who live in territories now zoned, are awaiting to be decided.

Secretary Hoover's Department—from its division given over to this subject of zoning and housing—has declared in its most recent Bulletin that approximately Twenty-six Million people are now living within territories zoned in the various municipalities of the United States, which comprise cities in 41 of the states (see Department of Commerce Publication under date of August 1925, at page 140 in supplement hereof).

This Court is being looked to, in this action, to determine whether Zoning Ordinances may be legally enacted under the Constitution of the United States.

It is the hope of the Counsel for the defendants and of people in many states and cities, that this Court may find it proper and fitting in this action to determine this fundamental and basic question.

First Zoning Ordinance in 1916—In New York City.

At the conclusion of a most thorough investigation by the authorities of the State of New York an Enabling Act was enacted by the State of New York for the City of New York alone. By virtue of this Enabling Act, New York City enacted its Zoning Ordinance in 1916.

Data Before Euclid Commission.

This report of this New York Investigating Commission was, of course, available to the Commission at Euclid Village, as many other reports and such other data, gathered by other Commissions and cities of the United States, were likewise open and available to and were used by the Euclid Commission.

Persons and property owners from every walk of life were invited and were heard and were heeded by the Commission. (Middle of page 205 of the Record)

In the several years the Euclid Zoning Ordinance has been in effect, none but one other appellant has ever filed suit, and this was decided in favor of the Village (top of page 208).

More Growth in past two years than ever before.

We believe it is but fair to make reference to that fact because the ordinance has been in effect for three years and because—during those years—there has been more growth and more building in the Village of Euclid than in many combined years theretobefore and there has been much more growth and building than in any other years theretofore—Two and three quarter millions in Homes in 1922 and 1923 (see upper part of page 105 of the Record).

And, too, the ordinance has been found to be ample and equitable and up-building and has been conducive toward a better safety, an ultimately more healthful condition and a greater public welfare (lower portion of page 207).

This Ordinance fulfilled the judgment and advice of the experts brought before the Commission by the Railroads and Industrials themselves.

The Zoning Ordinance permits approximately 1200 feet from the railroad track—toward Euclid Avenue—to be used for industry and the like and that very line of 1200 feet was adopted and ordained as being for the general benefit and welfare of the community and of all concerned, because the so-called industrial interests of their own accord, brought nationally known authorities and men whose judgment in reference to industrial plants, is recognized throughout the entire country and these experts, brought by the industrials themselves, testified before the Euclid Village Commission that the *ideal* and the *desirable* depth from the railroad for even the largest industrial plant, would be about 1100 feet and in obedience to and with respect for the judgment of these experts, the latitude allowed for industries was moved until it reached and *fulfilled* the very ideal suggested by these experts and the Ordinance was therefore amended in that respect to meet that ideal, because the Euclid Village Commission felt that this ideal could be permitted and reached without sacrificing the safety, the health and the general welfare of the community (lower half of page 206 and lower part of page 167 of the Record).

Apparently the Commission was correct and apparently the experts brought by the industrial interests were likewise correct, for—as indicated during the three years since the Ordinance has been in effect and as indicated by the years theretofore, no factory or industry—large or small—has ever built or has even applied for any permission to build nearer to Euclid Avenue than is permitted by this Zoning Ordinance. (103)

Why so many other places have adopted zoning.

But zoning has not been restricted to the State of New York alone, for, on the contrary, it has been found—by those other big and small cities of the country which have watched and followed it—to be not merely advisable but to be virtually *necessary* in order to truly and really create a municipality of health, of safety and of welfare.

Some of cities Zoned—All having IDENTICAL Ordinances.

Washington, D. C., Detroit, Pittsburgh, Cincinnati, Columbus, Omaha, Baltimore, Boston, Albany, Buffalo, Rochester, Ithaca, Toledo, Lima, Mansfield, Portland, Ann Arbor, St. Paul, Memphis, Newport, Salt Lake City, Seattle, Los Angeles, New Orleans, Minneapolis, Youngstown and Providence, and more recently Chicago are among some of the comparatively larger cities which have adopted comprehensive zoning ordinances.

Most all Large Cities are now Zoned.

Twenty-seven of the thirty-three cities which have population of 200,000 or more, have enacted Zoning Ordinances. (See Department of Commerce Bulletin of August 1925, on Supplement page 140 hereof.)

State after state have enacted Enabling Acts.

Within recent months, Connecticut, Delaware, Iowa, North Carolina, North Dakota, Oklahoma, Wisconsin, Wyoming and Pennsylvania have enacted State Enabling Acts and a number of other states have supplemented and amended their own Enabling Acts upon Zoning.

So that, as this brief is being dictated, there is not a part of the country—from the conservative and careful East to the freer Pacific states—which has not already

witnessed the benefits and the health, safety and general welfare results which are to be derived from zoned municipalities.

All Enabling Acts and Zoning Ordinances are substantially alike.

We make mention of the fact that almost each state Enabling Act is of practically the same phraseology as is the Enabling Act of Ohio, which is found in Section 4366-1 to 12 of the General Code, and more particularly in Subsections 7-8-9-10 and 11 thereof.

In fact, they are uniformly framed after the so-called "model" Act issued and sponsored by the Department of Commerce at Washington.

So, too, it will be found that almost each one of these ordinances is almost identically like each other one, except as to local names and situations.

Almost each one of these ordinances and certainly those of the cities which we have mentioned and many others which would go to make all too long a list—have created the very Use and Height and Area districts which are likewise created in the Euclid Ordinance.

Department of Commerce and Colleges are fostering zoning.

Congress, itself, has created a Department under the Secretary of Commerce which is intended and which is acting as advisor to municipalities throughout the entire country in reference to the subject of zoning.

It has written the model for most State Enabling Acts and for many municipal ordinances.

Twenty-six Million living in zoned territories in United States.

The most recent pamphlet, issued in August 1925 by the United States Government, shows Twenty-six Million people in the United States within zoned municipalities.

Harvard College has appointed a Secretary for the purpose of looking after the subject of zoning and allied subjects affecting municipalities throughout the country.

England makes zoning mandatory.

In England zoning was *permitted* until 1919, at which time, by an Act of Parliament, it became *mandatory* upon every city which, on January 1st, 1923, would have twenty thousand or more population. (Part II of 9 Edward VII, ch. 44 and Part II of 9 and 10 George V, ch. 35 of the Town Planning Acts of 1909 and 1919—Law Journal Public General Statutes of 1919.) (Kindly note The Law of City Planning and Zoning, by Frank Backus Williams, pages 409, 408 to 517, 518 *et seq.*)

And it is but fair to say that in England, the doctrine of Eminent Domain now generally applies with the same force that it does in our own country, so that zoning in England, without compensation, would be no more legal than it would be in this country if the zoning were held to fall within the province of the exercises of Eminent Domain instead of falling within the realm of the Police Power. (In this connection please see Statement of the Canadian Commissioner of Conservation on page 77 of New York's Final Report.)

Zoning is now widespread, because of health and welfare.

By reason of the widespread influence of zoning throughout the United States and by reason of the fact that it has been limited to no mere one section of the country and to no mere one state or group of states, but

that, on the contrary, it has been adopted literally, from coast to coast, from the Canadian to the Gulf lines, and by reason of the further fact that most of these ordinances have been adopted only after it has become apparent that there is a virtual *necessity* therefor and because there is so close an intimacy and so close a relationship between zoning on the one hand, and the health, the safety, the convenience, the prosperity, the comfort and the general welfare on the other hand, and though the validity of a Police Regulation is not to be rested simply upon popular opinion, it is, we believe, quite proper that we should cite the pronouncements of the Supreme Court, found in 167 United States, 518, *Canfield vs. United States:*

Strong preponderant opinion has its effect.

> "It may be said in a general way that the Police Power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong or preponderant opinion to be greatly and immediately necessary to the public welfare."

Congress has enacted a zoning ordinance like Euclid's.

As hereinbefore pointed out, the United States Congress has decreed that it believes that zoning has so close a relationship to health, safety and phases of general welfare, that, by act of Congress adopted on March 1st, 1920, found in U. S. Statutes at large, page 500, being United States Public Act No. 153 of the 66th Congress, a zoning act was passed for the District of Columbia.

And this Zoning Act, to all intents and purposes, is like the one in Euclid Village and it contains the Use restrictions, the Area limitations and the Height regulations, in almost the *identical* manner in which they are found in the Euclid Ordinance.

State after State and City after City and Congress have adjudged zoning to be legal and constitutional.

One state, impelled or inspired by a few bold or rash or intemperate men, or one municipality under the leadership of some momentary leader might enact an Ordinance and not much could be said to the effect that such an example—so standing alone—indicated any great consideration in favor of the constitutionality of such an isolated enactment.

These very zoning acts have been adjudged and decreed to be legal, valid and constitutional exercises of the Police Power—without compensation and as distinguished from Eminent Domain—by not merely the Village of Euclid, by not merely the State Legislature speaking through the Enabling Act of the State of Ohio, by not merely the Ordinances of well nigh on to four hundred other cities in the United States, by not merely more than a score of the States throughout the Union, but by the Federal Congress as well.

It means that after careful consideration by each of these many states of the Union and after full investigation, and that on the part of the hundreds of municipalities—including most of the largest in the country—and after discussion by the many legal minds in Congress, each of these law making bodies of these state and municipal Commissions arrived at the conclusion that zoning ordinances are not repugnant to the Federal Constitution but, on the contrary, are in harmony therewith. (A chapter is devoted to the question of constitutionality in the New York Final Report, page 51 to 72.)

These legislative bodies—municipal, state or Federal—would not have enacted the respective Ordinances or Enabling Acts if they had not believed the same to be in conformity with their respective state constitutions as well as in keeping with the Federal Constitution itself.

AS TO THE RELATIONSHIP BETWEEN THE ZONING ORDINANCES AND THE SAFETY, HEALTH AND GENERAL WELFARE.

Zoning increases values and tends to greater safety, etc.

It is the earnest belief of those who have studied Zoning, that instead of zoning ordinances resulting in a lessening or in an unfavorable infringement of the rights or of the values of any property, the *contrary* unfolds itself, eventually, as being the truth.

Many cities report that some of the original stoutest objectors have since become the most ardent supporters of zoning in their respective municipalities, because zoning naturally results in benefiting most land and property and in injuring none, and in this way, it not only prevents depreciation of all sections by intrusion of value-reducing conditions, but it, in addition to all that, gives so much greater opportunity for health regulations, so much more sensible and systematic and therefore community-serving opportunities for a much greater safety and it spells out a situation for a much greater general welfare. (Kindly note testimony to this effect at top of page 148; also pages 170, 171 and 168 showing how land values are injured because of lack of Zoning Ordinances and giving computations of the N. Y. Tax official in support thereof; and the similar statement of Mr. Clarence H. Kelsey, President of The Guarantee Title and Trust Company. All of these appear in the Final Report of New York.)

The simple example given by witness Laronge in the first full paragraph of page 204 and the picture given by their witness at lower portion of 162 and upper portion of 163 of the Record, will aid to illustrate one phase of this situation as to the increased value to the property holders and to the municipality which comes from zoning ordinances.

Residences which have been built in such factory-intended territory as pictured by the witness, are likewise seriously depreciated and reduced in value, as these houses find themselves the beneficiary of adjoining smoke, noise, odors, congestion, heavy traffic and all of the other effects which are attendant upon factory construction and factory operation. All of this is subversive of the health and welfare of the community. (Kindly note Mr. Whitten's testimony at lower portion of page 110 and all of pages 111, 112 and 113 of the Record.)

If the municipality had enacted a zoning ordinance, it would have defined this ideally situated industrial land for *industrialism* and then there would have been one great stretch which would have been developed for manufacturing and for parallel "Factory" streets, and this would have meant a very much greater value per acre or per square foot for manufacturing, than where this land is broken up by intervening allotments and by built up houses and where it finds itself neither a desirable industrial nor certainly a desirable residential district. (Please see middle of page 57 of the Final New York Report.)

So, too, householders would certainly not have built their homes in this territory because they would have seen and would have known, and would have been served with Ordinance notice, in *advance,* that this stretch of land was intended and ordained for industrial purposes and there would not have been a great number of residences found in the condition of having a full half of their value torn away by the advance of factories. (Page 77 of New York Final Report of 1916.)

New York City witnessed a most astounding loss of taxation values as to its public treasury in addition to an unbelievable loss to the private property owners when, along the lower portion of Fifth Avenue, its garment fac-

tories with the army of garment workers invaded the then high class shopping and retail district which was located along this lower portion of Fifth Avenue. (Lower part of pages 71 and 72 of 1913 Report of the New York Commission.)

Values fell to less than half, stores ran race with each other in vacating their then locations and in seeking other sites and the property owners found themselves despoiled of a great fraction of their property values. (See photograph "Figure 53" on page 116 of New York Final Report and pages 110 and 111 thereof.)

Little wonder, then, that the shopping district "took to its heels" and in its place stands what may be rightly termed a "semi-blighted" territory. And—as is inevitable—in the wake of this flight came poor and unfit working quarters and even poorer and less fit living quarters in the deserted and neglected buildings from which the former occupants had taken leave.

Here was another fertile field for the Workshop Inspector, for the sanitary police and the juvenile court and the truant officer and here was another addition to the city's "unfit" districts. This is but another picture of the many phases that zoning aids, for, by preventing such destruction, zoning *stabilizes* instead of destroying or lessening values and zoning results in financial gain to the property owners as well as to the public.

One intrusion without ordinance, steals neighbors' values.

But the difference between this transition under a zoning ordinance and the transition which takes place without a zoning ordinance, is perfectly apparent; for, without a zoning ordinance, a mill or a junk yard or a butcher shop or cement block factory or a paint factory or a tin shop owner buys in a business or in a residence

district, even while that district is in its prime and at its zenith, and over night, this one intrusion steals from each other property owner and from everyone thereabout, a considerable portion of the value of each parcel.

Under zoning, the territory is opened to the shop keeper or to the store-keeper only when and only as public consideration and general welfare and as the general trend dictate and the necessary enactment would naturally be voted only when the residence district becomes obsolete or has grown to be worn out or when it presents a situation where the *general* welfare would be better served if trades or factories or other uses were allowed to come in.

One selfish shop can not destroy other values, under zoning.

This means that instead of the districts being invaded during their prime or whenever it satisfied the selfishness of some one intruding individual, which would necessarily result in a destruction of values and a blighted territory, they would be revised under a zoning ordinance and the values would then—in all probabilities—be at a stage where there would really be an increase of value by the incoming use, which would mean a *benefit* to those which were coming in and which would mean no loss but rather a gain to the present owners, and all this would be markedly in favor of a greater public welfare.

Blighted territory means very closest relation to health and welfare, for it usually means poverty districts with all its ills.

The evidences are so common and so easily recognized that one is not surprised to find that the New York Commission wrote:

> "There is an intimate and necessary relation between conservation of property values as here pro-

posed and the conservation of public health, safety and general welfare.

"Throughout a city the areas in which values have been depressed by the invasion of inappropriate uses or lack of building control, are the areas in which the worst conditions as to sanitation and safety prevail and where there is the greatest violation of the things essential to public comfort, convenience and order. *The decline in property value in such districts is merely an economic index of the disregard of essential standards of public health, safety and convenience in building development.* Moreover, a depressed district of changing occupancy is almost always a district in which unwholesome home and work conditions prevail. The old building altered to suit a new use is usually very faulty in light, air and sanitation. Declining values make it difficult or impossible to enforce proper standards. *These depressed districts create the most difficult and perplexing problem in the establishment and administration of housing and factory regulations.*" (Page 14 of the Final Report of the New York Commission, 1916)

Zoning prevents huddling and indiscriminate throwing together of homes and factories and stores.

The blighted territory is concomitant with and is an index to the locality where all too frequently crime, vice, congestion and sickness are found to be the rule. (See pages 13 of New York Final Report.) Zoning, by its prevention of huddled houses without adequate provision for open spaces and in preventing dwellings, stores and factories being indiscriminately thrown together, becomes a potent force for the health and safety and general welfare. (Pages 21, middle of 56, top of page 146, middle of page 205 of New York Report, and lower portion of 110, 111, 121; upper portion of 184 of the Record.) And congestion means greater fire hazard, which it is the duty of

every municipality to prevent. (Page 139 of New York Final Report where is found Fire Chief Kenlon's statement.)

"Balanced" territories mean better condition of welfare and safety and health.

There is another large field which we believe ought to be called to the attention of the Court, and that is in reference to the now recognized necessity of having a "balanced" or "combined" territory instead of all one kind or all the other. We refer to the fact that if Euclid Avenue is permitted to be lined with industrials, factories and the like, it will mean that the street car service and the vehicular traffic will be congested during the morning hours and when it comes time to report for factory work and during the evening hours when quitting time arrives.

Whereas, if residences are not driven out or made unwelcome, there will spring up a "balanced" construction of residences and of industrials, which will mean that the vehicular and the street car congestion will be much less than if the whole territory is given to factory purposes, for then the householders will be able to walk from their nearby homes to the nearby factories and thus congestion will be greatly relieved, or the householders will find themselves going *down* to work on the comparatively empty cars and along the comparatively uncongested vehicular-side of the street, while the factory employees will come out upon those same cars or in vehicles on the other side of the street.

This will essentially lead to a lessening of congestion, both vehicular and in street cars. (Mr. Turner's statement at the middle of page 9 and page 31 of New York Final Report.)

The New York Commission, after resorting to most careful inquiry, found that the ratio of congestion in street cars is an index to the ratio of increase of communicable sicknesses. (Commissioner of Health, Dr. Haven Emerson's statement at bottom of page 8 and page 9 of New York Final Report.) The same commission and many other sources of information clearly show that this so-called "balanced" vehicular traffic, with part going down while the other part is coming up the street, instead of all coming up the street and comparatively none going down, has a close relationship to accidents and injuries and especially the safety of children. (A splendid statement upon this subject will be found on page 101 of the New York Final Report, given by Mr. Edmund Dwight of the Employers' Liability Company.)

Ordinance makes new streets feasible.

The ordinance will likewise make it not merely possible but feasible for one or more parallel thoroughfares to be constructed and maintained about two hundred and five hundred feet north of Euclid Avenue and parallel with Euclid.

Along this thoroughfare the industrial property owners will be able to have much greater freedom for their trucking and for the quick and *un*obstructed transportation of their supplies and needs.

This will also mean that much of the traffic will feasibly and probably be kept off of Euclid Avenue, which will likewise result in the lessening of accidents and the factories themselves will be able to much more quickly transport their own needs along these "hinter" streets and they will likewise undoubtedly find themselves subjected to a much lesser number of claims and damages for accidents and injuries and the public safety and comfort

will be better served. (See Statement of Edmund Dwight of the Liability and Assurance Corporation at the middle of page 12 and the Statement of Mills E. Case, Secretary Department of Police, as given on pages 98 and 99 of the New York Final Report.)

This provision for streets is conceded by complainant's witness (Witzel) at upper half of page 155; also by defense witnesses at upper portion of page 183 and lower part of 184 and lower part of 194. This was repeatedly and openly discussed during the year while the Commission of Euclid Village was framing this ordinance and studying the situation. Nowhere was this denied by complainant or by its witnesses.

Nevertheless the Trial Court wrote: (middle of page 53 of the Record) "In the restrictive scheme, however, no provision is made and none seems to be contemplated for the opening of necessary highways or the preservation of land for that purpose."

Less and Less Homes.

Before leaving this subject, we wish to advert to the question of that so-called "greater public welfare."

We refer to the question of the *American Home.*

The New York Commission in its report found, and there is additional abundant evidence to substantiate the fact, that modern tendencies are rapidly destroying and undermining the continuance of separate and individual homes and residences.

The best minds of America are exhorting Congress and the States to do all that is possible in order to stem and prevent this tendency. As each city grows, there are proportionately less families living in houses than in apartments and tenements and above stores. The bulwark

and the stamina of this country has always been credited and conceded to the home owning tendencies of the American People.

But that excellent situation is all too rapidly waning and being undone by many and varying influences.

It is generally conceded that the home owner who has the opportunity to have his little garden and to rear his family in a house and to raise his children with a greater freedom of fresh air and abundance of light, is one of the most important factors in the sustaining of the American People and American Principles. Please see page 141 of Supplement hereof.

It means not merely comfort but it means greater safety for the children; a more vigorous generation due to plentifulness of fresh air and sunlight accompany those who live in houses; it means cleaner streets; it means less accidents for the young ones because they have a yard in which to play instead of being compelled to resort to the streets or to other places; it means greater interest in public welfare and in civic affairs which usually attends the householder who, by reason of his home, pays taxes; it means a closer relationship to the schools, a more restful condition for the head of the family and a place where the yard affords recreation and the opportunity for flowers and plants which are the highest accompaniment of a growing generation, and all of this means better children and men and women and health as well. (Kindly note page 31; middle of page 109; lower half of page 13; the first full paragraph on page 201, page 195—Statement of Mr. George C. Whipple, Professor of Sanitary Engineering, Harvard University; all found in the Final New York Report; and Mr. Whitten's testimony at lower portion of page 110 and page 111, middle of page 113 and lower half of 121; Mr. Greenlund's testimony on page 184 and second

paragraph of 194; and lower portion of page 207 of the Record.)

If houses and homes and residences are not to find ready quarters in the suburban territories, then where will they find themselves sheltered?

If that hillside terrain on the south side of Euclid Avenue which is naturally intended for residential purposes, is blighted by the approach of industries and spur lines and business and factories up to the north side of Euclid Avenue, then it means just so much of a stealth of territory from residential and home purposes and it means just that much more contribution toward the crowding of people in the Village, toward the conditions which spell for more accidents to the children, toward the lesser number of home-owning families in the municipality and toward the lowering of health standards which must necessarily follow where the congestion is greater and where the houses and homes are fewer.

The principles underlying the exercise of police power are old, but it will be seen from the decisions of the courts, that they are constantly being applied to new situations. The greatest necessity for this application is in connection with our rapidly growing communities. It has been found that the usual regulations found in building codes are not comprehensive enough to control the growth of a city upon welfare and healthful lines; to restrict the manufacturing to sections best adapted to it and where it will produce the least injury to the health; to prevent the blighting of large areas by industrial plants and business of a character unwholesome to inhabitants; to prevent slums and congested living quarters which always develop in blighted territory; to provide for the stability of property values, not only to home owners but to business houses and industrial plants as well, all of which makes

for a greater public welfare; to limit fire risks; to prevent lack of air and light; to enforce reasonable regulations as to light and air in building construction; to limit height of buildings; all of which when properly applied come well within the police powers.

It is to be regretted that the principles of zoning were not early applied to the City of Cleveland. It would not have had the congestion that now exists in the eastern section of the city.

The city of Cleveland has had a Commission studying this subject for four years. It has had a special assignment of engineers serve this commission.

And just a few months ago—after this research and study of four years—the Cleveland Council voted twenty thousand dollars more, with which to conduct the actual drafting of its own Zoning Ordinance. This ordinance is proceeding along the same lines as all so-called "standard" Zoning ordinances.

But Cleveland is assuming this task too late—after most of the damage has been done, after its blighted territories, its congested districts, its resulting "slums" and its "mixed" territories have overcrowded its hospitals, have overtaxed its juvenile court, have greatly impoverished its tax returns, have made necessary greater police and fire departments, have increased its daily accidents and have driven out countless of its homes.

Just so, Lakewood, Shaker Heights, Cleveland Heights, South Euclid, East Cleveland and most of the municipalities in this (Cuyahoga) County have adopted identical zoning ordinances; for they have seen not only the advantages but the *necessity* and *need* thereof in the light of present day tendencies and complexities.

New York, as is shown by the report of its Commission, must, for time to come, maintain a much larger fire and police force than would be required if the height of buildings, the area of lot per building and the use of lots and land had been regulated—if the city had been districted under a zoning ordinance. (Statement of Commissioner of Conservation, Thomas Addams, at the middle of page 77 of New York Final Report and top of 184 of the Record.)

And yet the argument of complainant was to the effect that there should not be and could not legally be any "districting" until all or most of the village had been built upon. Indeed, the Trial Court—at the upper portion of page 316 of the 297 Federal Reporter—declared a *present* districting *before* the damage was done and before the community's welfare had been completely defeated, to be the "placing of the village in a strait-jacket." With this the defendants and countless others are unable to agree.

REGARDING the OPINION of the Trial Court.

First: The opinion of the Trial Court appears to be deeply trenched in the theory that if a damage be shown, that of itself establishes unconstitutionality.

Not intending to make light of any loss or burden which might possibly fall upon the complainant, we cannot submit to the proposition that damage alone—even if proven—establishes unconstitutionality, for it is recognized by the Federal as well as the State Courts that in the proper exercise of the Police Power, burdens and losses very often fall upon at least a part of the members of the community and sometimes such damage falls upon most of the community, and yet that loss or damage of itself, does not constitute or establish unconstitutionality. Striking examples of this may be seen in the numerous decisions both State and Federal. (For example: 199 U. S. 306, 54 O. S. 284, 123 U. S. 623, 200 U. S. 561, 237 U. S. 171, 239 U. S. 410, 97 O. S. 130, 229 N. Y. 320, 113 Kans. 153, 207 U. S. at 87, 214 U. S. at 91—all *infra.*)

In this connection it is to be remembered that the proof not only apparently failed to establish any damage but the greater weight if not all thereof, established an enhancement of value for the complainant's land.

Second: In the Opinion, the Trial Court cited cases which we do not believe support the text of the Opinion. For example the cause of *Eubank vs. Richmond* in 226 U. S. 137, (cited at the lower portion of Page 312 of the Opinion) did *not* hold that Zoning was unconstitutional, for it was distinctly confined to the holding that that particular ordinance delegated legislative power to the adjoining property owners and also that the issuance of the permit was dependent upon this illegally delegated power as well as upon the whim of the official in charge. This is plain

from the decision itself as well as from 242 U. S. at its concluding paragraph where Justice Clark *again* made it clear that this *Eubank* case did *not* stand for the doctrine for which it is cited by the Trial Court in the present case. Likewise, the case of *Spann vs. Dallas* does not establish the doctrine which the Trial Court ascribed to it, for that case was plainly decided upon the fact that the city did not have the delegated power; that the districts were indefinite and not defined and that it depended upon the consent of three-fourths of the property owners. It does not present a zoning ordinance. The *un*qualified citing of this case as being adverse to a comprehensive zoning ordinance is *not*, in our judgment, warranted.

So too, *Friend vs. Chicago,* cited at middle of page 315 of the Opinion was decided quite some years ago and before there were any zoning Acts or Ordinances in this country; it was not founded upon any partial or comprehensive zoning ordinance nor has it generally been looked upon as any authority in connection with this subject. The same must be said regarding *Dorr vs. St. Louis,* which is similarly cited in the Opinion. The distinction in both of these cases is so apparent that their being cited as unqualifiedly supporting the doctrine for which they are urged, is a rather broad claim, we believe.

Many cases which are founded upon facts much more akin to the present situation and many pronouncements of the courts which are much more closely related to the subject, might have been cited in this brief, but because they really do not support or determine the doctrine here in question and because the facts or the legislation did not identically compare with that now in issue, we have purposely refrained from citing those cases as authority upon the subject at bar—as for example the important case of *Salt Lake City vs. Western Foundry Co.,* 55 Utah 447, and

the New Jersey case of *Schait vs. Senior,* 117 Atl. Rep. 518, and *Cliffside Park Co. vs. Cliffside,* 96 N. J. L. 278.

By the same token, we believe that less closely related decisions and less similar facts in those cases ought to preclude the citation of a goodly number of those decisions to which reference is made in the Opinion as well as those which were cited by the Complainant at the Trial Court hearing.

We have purposefully refrained from citing the case of *Hadacheck vs. Los Angeles and Sebastian,* 239 U. S. 394, as authority for the upholding of the present ordinance, because, though we recognize that this California case is repeatedly cited as supporting zoning, we believe such a contention is unfounded, for the *Hadacheck* case found its principal basis upon the right to exclude a business which really was or might readily have become a *nuisance.* We offered several references to this case, but these references have been on the subject of only collateral questions —such as the right and need to make classifications and such as the doctrine that mere damage alone does not render a police regulation unconstitutional, but nowhere did we cite this case as supporting the doctrine of a zoning ordinance, though many pronouncements in that decision would strongly tend to indicate expressions favorable to the validity of zoning.

In this same way, meaning to make this brief temperate and not all-claiming, we have refrained from citing the cause of *Manhattan Oil Co. vs. Des Moines,* 193 Iowa 1096, as an authority supporting zoning and have referred to it only for what *it really stands,* though many of its splendid paragraphs might most properly be urged as supporting a Zoning Ordinance. Likewise, we have made no reference, nor in the Trial Court did our *own* brief

make reference to the so-called *"Rent Law"* cases nor to the so-called *"Bill Board"* cases (*Cusack vs. Chicago*), for we have always seen so clear a distinction between those facts and the pronouncements in those cases as to make them improper of unqualified citation in support of a zoning ordinance.

Third: The case of *The Pennsylvania Coal Co. vs. Mahon* has had an important place in the Opinion of the Trial Court. It would be quite improper for us to attempt to point out to the Supreme Court what was meant by this decision. However, we take the liberty of saying that we understand the facts in the *Mahon* case to be clearly different from the situation in the present instance and the destruction of the *contract rights* as well as the destruction and taking of the title to and the *estate* in the property—not merely regulating its use—as being at least two points which mark the *Pennsylvania* case as unwarranted in being cited in the instant cause.

No property right and no estate created by deed or other instrument is here abolished, destroyed or even regulated. The property rights asserted by Complainant are simply those which inhere generally in the owners of land; and it is axiomatic that all property is held subject to the general right of the public to regulate its use for the promotion of public health, safety, convenience, welfare. Beyond this, zoning regulations do not fall within the *Pennsylvania Coal Company* case where specific property interests created by contract were destroyed by the statute.

The *Mahon* case was generously quoted by Counsel for the present complainant, where the same Counsel, as *amici curiae,* in the Supreme Court of Ohio in the cause of *Pritz vs. Messer,* filed an adverse brief. Notwithstanding this, the opinion of the Ohio Supreme Court—favor-

able to zoning—makes no reference to the *Mahon* case and this would seem to have indicated that our Ohio Court did not regard the *Mahon* case as being pertinent or controlling in reference to a zoning ordinance situation.

Fourth: The opinion of the Trial Court, at the middle of page 315, stresses the fact that the Federal Supreme Court has sustained many cases only because the final court of these respective states from which the appeals have been prosecuted, have decided in favor of the particular respective limitations involved in those cases and then the Trial Court pointed out the fact that there was no decision of the final court of Ohio in reference to zoning limitations. Since that opinion was written, the Court of last resort in Ohio—in the recent case of *Pritz vs. Messer, infra*—has apparently determined that the basic limitation, as to use, height, bulk and location and as to the right to establish zones therefor, are a valid exercise under the State as well as under the Federal constitution, so that the language of the Trial Court in reference to both of these points now appears to be opposed to its own ruling.

Fifth: The decisions hereinafter set forth compel us to dissent from the upper portion of page 317 where the Opinion ascribes the favorable Massachusetts and Louisiana decisions to State constitutional amendments, for each of these decisions are plainly and, in the language of their own courts, not so founded. (See pages 278 and 280 of 154 La. and page 611 of 234 Mass.) Nor can we subscribe to the assertions on page 317 to the effect that California and Minnesota are opposed to zoning, because we have the clear language of these courts, as appears hereinafter, to the contrary. Both of these states have held these ordinances legal and constitutional.

Sixth: In final, we are unable to agree, as set forth in the concluding paragraph of the Opinion, that this *entire*

ordinance is illegal and—for the many reasons, and owing to the hereinbefore cited proof as well as because of the hereinafter cited decisions—we respectfully dissent from any determination holding this ordinance illegal as to the complainant or its land.

Seventh: The Trial Court, at the bottom of page 316 of the Opinion, stated that "the great weight of State authority, as well as sound reason, is with the cases which hold an ordinance imposing restrictions such as here involved to be invalid, as an unreasonable taking of private property." Chief Justice Rugg and all of his associates in the highest court of Massachusetts; all of the members of New York's highest tribunal; the Chief Justice of Louisiana and his co-members; the Justices of California's highest court; the majority of Minnesota's Supreme Court; the members of the Supreme Court of Wisconsin; the entire Kansas Supreme bench; Justice White being among the minority of the Missouri Court; likewise Chief Justice Bond of the Maryland Court and now the Ohio Supreme Court—as found in the body of the *Pritz vs. Messer* decision—have *expressly* stated that in their respective judgments the weight of authority and the better reasoning are in *favor* of the validity of these ordinances.

ARGUMENT.

AS TO COURT DECISIONS.

In this succeeding part, we are desirous of inviting the attention of the Court to the decisions of the Federal Supreme Court and of the final courts of the States, in reference to the rules attendant upon the exercise of the Police Power and in reference to the specific decisions upon the question of Zoning itself.

POLICE POWER.

By reason of "Article X" of the Federal Constitution, the Federal Supreme Court has repeatedly declared that the Police Power was specifically and purposely reserved by and to the states themselves. This was the very purpose of this amendment to the Constitution:

> "The powers not delegated to the United States by the Constitution, nor prohibited to the States, are *reserved* to the states or the *people.*"

LATITUDE OF POLICE POWER.

The great width and the very great latitude of the Police Power may best be appreciated and set forth by the following decisions:

The police power is well stated by Justice Harlan in *C. B. & Q. Railway vs. Drainage Commissioners,* 200 U. S. 561, 592, decided March 5th, 1906:

> "The learned counsel for the railroad company seems to think that the adjudications relating to the police power of the state to protect the public health, the public morals and the public safety are not applicable in principle to cases when the police power is exerted for the general well-being of the community apart from any question of the public health, the public morals or the public safety * * * We cannot assent to the view expressed by Counsel. We hold that

the police power of a state embraces regulations designed to promote the *public convenience or the general prosperity,* as well as regulations designed to promote the public health, the public morals or the public safety."

Freund in his treatise on the Police Power well states that a study of the various cases in which the police power has been applied

"will reveal the police power not as a fixed quantity, but as the expression of social, economic and political conditions. As long as these conditions vary, the police power must continue to be elastic, i. e., capable of development."

94 U. S., page 113 at page 124, *Munn vs. Illinois.*

POLICE POWER KEEPS PACE WITH NEW CONDITIONS.

The Village of Euclid and all of the many states and the array of municipalities which have adopted these Zoning Ordinances have felt that the Police Power necessarily *must keep step with* and *must keep pace with* the *new* and daily problems presented by the complexities of modern civilization, transportation and conditions.

These ordinances are not thought to be any enlargement or stretching of the Police Power, but are merely necessary steps required and really demanded by the swiftly moving current of modern conditions.

Accurately speaking, the Police Power does not grow for it is always complete. New public needs, new situations and new conditions necessitate new methods and require legislative enactments.

American urban conditions present problems so different from the problems of the pioneer and early rural life, that new types of measures become necessary to solve and control and meet these new conditions.

But the Police Power is always equal to the requirements of the public welfare.

As was said in *Bacon vs. Walker,* 204 U. S., page 317:

> "It, the Police Power, extends to so dealing with the conditions which exist in the city as to bring out of them the greatest welfare of its people."

In 239 U. S. 394, *Hadachek vs. Los Angeles,* Justice McKenna, speaking for the court, said:

> "While the police power of the State can not be so arbitrarily exercised as to deprive persons of their property without due process of law or deny them equal protection of the law, it is one of the most essential powers of the government and one of the least limitable—in fact, the imperative necessity for its existence precludes any limitation upon it, when not arbitrarily exercised.
>
> "A vested interest can not, because of conditions once obtaining, be asserted against the proper exercise of the police power,—for to so hold would preclude development. (*Chicago & Alton Railroad vs. Traubarger,* 238 U. S. 67.)
>
> "There must be progress, and in its march, private interests must yield to the good of the community."

237 U. S. page 52 at 58, *Sligh vs. Kirkwood;*

113 U. S. page 27, *Barbier vs. Connolly;*

177 U. S. page 183, *Gundling vs. Chicago;*

219 U. S. page 104, at page 111, *Noble Bank vs. Haskell.*

PRESUMPTION OF VALIDITY.

In reference to legislation—whether state or municipal—the Courts have decreed that Police Power Legislation is particularly presumed to be valid and legal.

Sinking Fund cases, 99 U. S. at 718;

Powell vs. Penn, 127 U. S. at 684.

COURTS WILL NOT ASSUME FUNCTION OF LEGISLATIVE BRANCH.

The Courts have further said that the judgment of the Court as to the necessity or propriety of the legislation will not be substituted for the legislative branch itself, unless the legislation is so apparently and so palpably unreasonable and arbitrary, that it can have *no possible* relation and *no possible* justification under either health, safety or general welfare.

113 U. S. 27, *Barbier vs. Connolly.*

Here Justice Field declared:

"The provision is purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies.

"And it would be extraordinary usurpation of the authority of a municipality, if a Federal Tribunal should undertake to supervise such regulations."

TO BE UNCONSTITUTIONAL, MUST HAVE NO RELATION TO HEALTH AND WELFARE.

The decrees of the Court establish the fact that before the legislation of this nature can be held unconstitutional, it must be found that the legislation has *no* relationship to either health, or safety, or public convenience or public comfort or prosperity or general welfare.

Opinion of the Court by Justice Clarke in 242 U. S. at bottom of page 530 and top of page 531, *Cusack Co. vs. City of Chicago.*

55 Utah at page 452, *Salt Lake City vs. Foundry Co.*

135 N. W. Reporter at 378, *State vs. Whithouse.*

In 240 U. S. at page 513, at the first and second paragraphs of *Armour & Company vs. North Dakota*, the Court said:

"The Supreme Court considered the statute as but a development of other laws passed in the exercise of the Police Power of the state to secure to its inhabitants pure food and honest weights, questions which the court thought were 'inseparably allied and any argument advanced upon one applied equally to the other.' And the court said as the law was drafted by the Pure Food Commission, it might be reasonably assumed, 'after 12 years of observation and study' and, further, that 'the expert who drafted the law, the legislature who passed it and the Governor who approved it, all thought necessity existed for the measure. If we did not agree with all those, we might well hesitate to say that there was absolutely no doubt upon the question, but in fact a majority of this court believes the law not only reasonable, but necessary, and this belief was founded on the evidence in this case and upon facts of which this Court can take judicial cognizance.'

"The Court, by these remarks, expressed the test of a judicial review of legislation enacted in the exercise of the Police Power, and in view of very recent decisions, it is hardly necessary to enlarge upon it. We said but a few days ago that if a belief of evils is not arbitrary we cannot measure their extent against the estimate of the legislature, and there is no impeachment of such estimate in differences of opinion, however strongly sustained, and by evils, it was said, there was not necessarily meant some definite injury but obstacles to a greater public welfare. Nor do the courts have to be sure of the precise reasons for the legislation or certainly know them or be convinced of the wisdom or adequacy of the laws. It only remains to apply to the present case, the principles so announced."

After reading Mr. Greenlund's testimony on page 183; the upper half of page 184; the lower half of page 185; the middle portion of page 186; and Mr. Laronge's testimony at the lower portion of page 200, Counsel's own

testimony on pages 207 and 208; Mr. Ambler's contribution in the middle paragraphs of page 143; Inspector Stein's version at the lower portion of page 105 and top of 106, at the middle portion of 104; Fire Chief Ballou's thoughts as set forth at the middle of page 123, and on pages 95, 96, 97 and 98; Witness Kunkle's admissions at lower half of page 93 and throughout pages 94 and 89; Mr. Witzel's similar admissions on page 161; and the logical reasoning as expressed by Mr. Robert Whitten on pages 110, 111, 112, 113, lower half of page 120 and all of page 121; Mr. Laronge's statement in the concluding paragraph of page 200 and top of 201 of the testimony in the Record, who would be justified in saying that they are convinced there COULD be no relationship between this Euclid Village Ordinance and the safety, health and general welfare of the community?

UNCONSTITUTIONALITY MUST BE PLAINLY AND PALPABLY CLEAR.

Before legislation of this nature may be held unconstitutional and unwarranted, it must be made to *plainly* and *palpably* appear that the legislation has no such *possible* relationship. *Jacobson vs. Massachusetts,* 197 U. S. 11.

In 242 U. S. at top of page 531, *Cusack Co. vs. City of Chicago,* Justice Clarke, speaking for the Court, said: "We therefore content ourselves with saying that while this Court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the state enacting them and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court

of the State whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals or to the general welfare. *Jacobson vs. Mass.*, 197 U. S. 11, 30. And this, for the reason stated, cannot be said of the ordinance which we have here read"—and then—who can safely and without fear of contradiction say that it is plain and palpable that there is *no* relation to the public health and safety and welfare in this Euclid Village Ordinance?

MUST BE PLAINLY AND MANIFESTLY UNREASONABLE.

Likewise, before such legislation can be decreed to be unconstitutional, it must be found to be clearly and plainly and manifestly unreasonable and arbitrary.

242 U. S. at 529, *Cusack vs. City of Chicago;*
239 U. S. at 171, *Porter vs. Wilson.*

ILLEGALITY MUST BE CLEARLY ESTABLISHED.

Akin to the doctrine that such legislation is presumed to be valid, and as corollary thereto, it has been laid down as a rule that unconstitutionality is not to be *presumed* but must be *clearly established* and proved."

Sinking Fund Cases, 99 U. S. 700 and 718;
Powell vs. Pennsylvania, 127 U. S. 678 at 684;
216 N. Y. 154, *People ex rel. vs. Warden etc.;*
214 N. Y. 395, *People vs. Charles Schweinter Press.*

In the Record, can such proof be found as to constitute a clear establishment of the unconstitutionality of the ordinance in question?

FINANCIAL LOSS IS NOT THE TEST.

In the proper exercise of the Police Power, the Courts have said that even though there be a tremendous financial loss, yet that can not stand in the way of the public welfare because the public welfare can not be impeded or thwarted by private loss which is incident to such exercise of the Police Power.

Hadachek vs. Los Angeles, 239 U. S. at 410;
United States vs. Noble, 237 U. S. at 78;
Reimman vs. City of Little Rock, 237 U. S. at 171;
Erie R. R. Co. vs. Williams, 233 U. S. at 700;
Mugler vs. Kansas, 123 U. S. 623;
Sheehan vs Scott, 145 Cal. 684;
Cochran vs. Preston, 108 Md. 220;
State ex rel. vs. Cunningham, 97 O. S. 130;
Biggs vs. Steinway, 229 N. Y. 320.

LOCAL CONDITIONS MUST BE CONSIDERED.

It has often been the pronouncement of the courts that in interpreting Police Regulations, they must be interpreted in the light of the conditions of climate and the circumstances and the particular needs and situation of the particular community and that, if in the light of these conditions, the legislation can not be said to have no relationship to health, safety and general welfare and the like, then the legislation must be sustained and held valid.

McLean vs. Denver, 203 U. S. 38;
Ohio Co. vs. Indiana, 177 U. S. 190;
Affeld vs. N. Y. Co., 198 U. S. 361;
Welch vs. Swasey, 214 U. S. 91;
Plesay vs. Ferguson, 163 U. S. 537;
Brown vs. Walling, 204 U. S. 320.

THE KIND OF "TAKING" UNDER POLICE POWER IS NOT PROHIBITED.

Though there is unquestionably a "taking" under the exercise of Police Power, yet that taking is not such as is inhibited by or as requires compensation under the Constitution. This view is recognized in the case of *Interstate etc. Ry Co. vs. Commonwealth,* 207 U. S., 79, at page 87, speaking through Justice Holmes:

> "If the Fourteenth Amendment is not to be a greater hamper upon the established practices of states in common with other governments than I think was intended, they must be allowed a certain latitude in the minor adjustments of life, even though by their action the burdens of a part of the community are somewhat increased. The traditions and habits of centuries were not intended to be overthrown when that amendment was passed."

239 U. S. at Page 410, *in re Hadachek;*
214 U. S. at 91, *Welch vs. Swasey;*
108 Md. at 220, *Cochrane vs. Preston;*
218 N. Y. at 540, *Publicity Co. vs. Sup. of Building;*
97 O. S. at 130, *Euclid Doan Co. vs. Cleveland.*

The Supreme Court, speaking through Justice Harlan in 113 U. S. page 127, *supra,* said:

> And it would be extraordinary usurpation of the authority of a municipality if a Federal Tribunal should undertake to supervise such regulations. The Fourteenth Amendment of the Constitution does not impair the Police Power of a Municipality."

CLASSIFICATION IS PERMITTED AND EVEN NECESSARY.

Under the exercise of the Police Power, classifications may and indeed must almost necessarily be resorted to and such classification does not invalidate the legislation if it treats all, within the same class, upon an equality.

280 Federal Reporter, at 394 in *Chicago & N. W. Railway vs. Railroad Commission;*

214 U. S. at top of pages 105 and 106, *Welch vs. Swasey;*

239 U. S. at page 395, syllabus 3, *Hadachek vs. Los Angeles;*

127 U. S. at page 687, *Powell vs. Pennsylvania.*

NOT INVALID IF THERE COULD HAVE BEEN A VALID BASIS.

The validity of Police Power legislation must be sustained if there COULD have been any basis upon which the legislative body might have thought or based its enactment.

280 Federal, at page 393 (1), *Chicago R. R. Co. vs. R. R. Commission.*

COURT WILL NOT SUBSTITUTE ITS JUDGMENT FOR LEGISLATIVE DIVISION.

The courts will not substitute their judgment or ideas in place of the legislative bodies, nor will the courts measure their judgment over, on such subjects, as against that of the legislative division.

Kindly see 240 U. S. at second paragraph of page 513, *Armour & Co. vs. North Dakota.*

197 U. S. 11, *Jacobson vs. Massachusetts;*

198 U. S. at page 6, *Benson vs. Henkel;*

242 U. S. at top of page 531, *Cusack Co. vs. City of Chicago;*

55 Utah at page 455, *Salt Lake City vs. Western Foundry etc. Works;*

67 Illinois at 113, *C. B. & Q. R. R. Co. vs. Haggarty;*

113 U. S. at 127, *Central R. R. vs. Petters.*

The GENERAL application and not one SINGLE instance must be the guide.

It has repeatedly been held that the validity of a Police Regulation is not to be adjudged or determined by the question of whether some one piece of property or some one use might not injure the health or safety or general welfare, but, rather, that the constitutionality is to be adjudged upon the general purpose and relationship of the ordinance and upon its *general classifications.*

164 N. Y. 510;

179 N. Y. 325;

249 U. S. 269; Syllabus 2 and upper portion of Page 271, and lower portion of Page 273 and at page 274;

248 U. S. at page 500.

In 26 L. R. A. (N. S.) 842, *Benz vs. Kremer,* the court said:

> "If the rule be in the interest of the public health it must be general and all within the class controlled by it.
>
> *Individual* cases can *not* determine the necessity of a general law on the subject, nor, indeed, rule the question of classification."

CONSTITUTIONALITY OF BOARD OF APPEALS.

The validity of the Board of Appeals has been sustained by the following decisions, some of which are in reference to these very Boards and some of which are in reference to other kinds of legislation where Boards have been provided and where their legality has been challenged on the basis of a delegation of legislative power:—

234 N. Y. 484, *People vs. Board of Appeals;*

214 U. S. at 103 to 108, *Welch vs. Swasey;*

136 N. E. 338 (Mass.), *Ayer vs. Cram,* (242 Mass. 30);

203 App. Div. 468 (N. Y.), *Broadway Company vs. Nulle, Superintendent;*

108 Miscellaneous 193 (N. Y.), *Sanders vs. Walsh, Supt.;*

236 U. S. 230, *Mutual Film Company vs. Ohio Industrial Commission.*

At the lower portion of page 60 of the Record, the Trial Court, in its Opinion, said:

> "In New York the validity of the statute of the State and ordinance of New York City is assumed rather than decided. Furthermore, the law and ordinance both provide: by means of a board, for suspending or varying restrictions application of any aggrieved owner."

In almost identical words, The Ohio Enabling Act (Section 4366—11) and the Euclid Ordinance (Section 23) do the same thing. The concluding portion of Section 23 of the Zoning Ordinance of Euclid Village provides that:

> "Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this Ordinance, The Board of Zoning Appeals shall have power, in a specific case, to interpret any such provision in harmony with the general purpose and intent of this Ordinance, so that

the public health, safety and general welfare may be secured and so that substantial justice may be done." (See page 24 of the Record.)

And yet the Trial Court pointed out that this difference between the New York Law and Ordinance and that of Ohio and Euclid Village, whereas there is no difference.

It is to be remembered that the Petitioner in the instant case did not apply to or go before the Zoning Board of Appeals nor did it apply for any permit whatsoever, nor submit any plans. (Kindly note top 6 lines of page 104 of the Record.)

However, in order to anticipate any contention on the part of the Complainant that the Zoning Board of Appeals is without legal standing on the ground that it is exercising legislative powers, we have deemed it advisable to refer to these phases of the subject and to these decisions in reference thereto.

In fact, some courts have held that a Zoning Ordinance, without a Board of Appeals is illegal because of the very absence of a Board of Appeals.

In the cause of the *Presbyterian Church of Omaha vs. Edgcomb*, 189 N. W. 617, it was found that the Zoning Enabling Act of Nebraska sets forth a general statement of the requisites of the standard Enabling Act with the *exception* of the Board of Adjustment and under the powers conferred by this act the City of Omaha passed a Zoning Ordinance which, among other things, established an area district called "E" in which buildings could occupy only 25% of the lot.

The church corporation had bought a building plot in such a district before the ordinance. Needing to occupy more than 25% of the lot, the church asked for a permit to cover 38%. As there was no Board of Adjustment to make a variance in this plainly exceptional situation the church sought a writ of mandamus to compel the Building Inspec-

tor to issue the permit. The Court of last resort held that it was unreasonable and confiscatory to prevent the construction of such a church because it somewhat exceeded the percentage allowable, inasmuch as it could not be shown that such a church in such a district would be harmful to the health or safety of the community. The ordinance was declared unconstitutional in *this* respect.

If the State Enabling Act had provided Omaha with a Board of Adjustment with power to vary in exceptional cases, this declaration of unconstitutionality would probably not have arisen.

Here is a rather plain case where the lack of safety valve function supplied by the Board of Adjustment brought about a declaration of unconstitutionality.

The case of the *Chicago Railroad Company vs. the Railroad and Warehouse Commission of Minnesota,* decided in May, 1922, held that "the law giving the commission power to allow deviations from the specifications, largely takes away the force of the argument that the law is illegal."

> "It is further claimed that this provision is subject to the arbitrary whim of the Railroad and Warehouse Commission.
>
> In cases of this kind, however, it will be assumed that the public commission will act fairly and with reason and not arbitrarily." 280 Fed. at 395, *Chicago R. R. Co. v. R. R. Commission.*

So too, in 242 U. S. page 590, *Merrick vs. Halsey & Co.*:—

> "The contentions based on the exemption and provision are a part of that which accused the law of conferring arbitrary discretion upon the Commission. The accusation is formidable in words, but it is the same that has been made many times. We repeat, there is a presumption against wanton action by the commission."

APPEAL BOARD IS LEGAL.

The entire case of the *State of New York ex rel. Sheldon vs. The Board of Appeals,* (234 New York 484—January 1923) proceeded upon the theory and the decision, in every line acknowledged that the Courts of New York and of some other states have continually and uniformly recognized the validity and the constitutionality of the Board of Appeals in these very Zoning Ordinances.

The decision is so manifest in this respect, that it does not recognize that question as any longer open to debate.

Board of Appeals Fills a Very Needed Purpose.

It is important to note what the highest court of New York State says in this recent decision, in reference to the desirability and the need of the power vested in the Board of Appeals. The Court stated:

> "The enumerated laws embodied the first comprehensive scheme relating to the division of the city of New York into districts and the class and character of the buildings to be permitted to be erected in such districts; in 1914 when the first statute was enacted the population of the city was upwards of five millions, the territory embraced within the boundaries of the city was three hundred and ninety-five square miles; the city was rapidly increasing in population and commercial activity and one would need be optimistic to conclude that the Board of Estimate and Apportionment in the labor assigned to it could avoid all unreasonable discrimination."

The court thereupon dismissed the action against the Board of Appeals and said, in the final paragraph of its twelve page decision:

> "Concluding, therefore, as we do, that the legislation authorized the Board of Estimate and Apportionment to confer upon the Board of Appeals the authority exercised by the Board in this case, the order of the lower courts must be reversed and the writ must be dismissed with costs upon and against the appellants in all courts."

AS TO COMPREHENSIVE ZONING DECISIONS.

The following decisions will indicate the list of causes in which *comprehensive* zoning ordinances have been held to be constitutional exercises of the Police Power. In each of these cases, damage was alleged and even admitted, whereas in the case at bar the proof disputes and negatives damage. In each of the following cases where the respective zoning ordinance was upheld the courts ruled that even if damage be admitted and proved, that would not deny the municipality the right to reasonably exercise its Police Power.

IN NEW YORK STATE.

The Lincoln Trust Company vs. Williams Building Corporation, found in 229 New York Reports 313; having been decided in 1918.

229 New York Reporter 320, *Biggs vs. Steinway and Sons,* decided in July 1920.

In this case, the piano people, Steinway & Sons, agreed to buy a parcel of property for $280,000.00 on W. 57th Street in New York City.

$28,000.00 was paid down on the contract which provided for the payment of the balance of $252,000.00.

Before the time arrived for the payment of the $252,000.00 balance, the New York "Zoning Ordinance" was adopted by the City of New York, which ordinance prohibited the erection of a *business* building on the property in question, because of its being in a *Residence* Use district.

Thereupon, Steinway and Sons refused to complete the transaction.

In this case, by virtue of the zoning ordinance, there was no mere slight "taking," but, on the contrary, the entire parcel was found to be useless for the purpose intended by the piano company.

At page 323, the final court of the State of New York said:

> "We have held that the zoning ordinance is a valid exercise of the police power."

It may not be amiss to point out that the Euclid Ordinance is almost an exact duplicate of the New York City Zoning Ordinance, except as to local names and locations.

The People of the State of New York ex rel. Sheldon, et al. vs. the Board of Appeals of the City of New York et al., decided January 16th, 1923 by the highest Court of New York State and reported in 234 N. Y. 484.

As parties to this suit, upon their own request, were the Waldorf-Astoria Hotel, the Farmers Loan & Trust Company of New York, the Joseph Choate estate and other equally well known parties.

The property in question was located on Madison Avenue, between 35th and 36th Streets and fronting, around the corner, on 35th and 36th Streets as well, involving the right of a *business or store use to encroach upon a residence use.*

The court stated that the question presented to the court was, "upon the sole ground that the Board of Appeals of the City of New York had exceeded its jurisdiction."

Mr. John G. Millburn was counsel for the parties complaining. Mr. Henry W. Taft represented The Farmer's Trust Company as Trustee of the William Waldorf Aster Estate, and the Coporation Counsel of New York (John P. O'Brien) represented the Board of Appeals. Mr. Edward M. Bassett as *Amicus curiae*, filed a brief in favor of the Board and supporting the Zoning Ordinance.

The court quoted the amended Section 20 of Article 5 of the New York Zoning ordinances, as follows:

> "Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict

letter of the provisions of this resolution, (the Zoning Ordinance) the Board of Appeals shall have power in a specific case to vary any such provisions in harmony with its general purpose and intent, so that the public health, safety and general welfare may be secured and substantial justice done." (Like the Euclid Ordinance.)

In this instance the New York Board of Appeals granted certain relief when the aggrieved parties came before it on appeal from the ruling of the Superintendent of Building, which ruling of the Building Superintendent had refused to permit the construction of a certain building. There was an allegation made before the Board of Appeals that the enforcement of "the strict letter of the provisions of the ordinance would work an unnecessary hardship."

In the New York case, the complainants did appear before the Board of Appeals and the Board of Appeals did grant them relief. In the case at bar, the complainant has not applied for any permit and has refused to present its case before the Euclid Board of Appeals.

In the New York case, the relief having been granted by the Board of Appeals, certain of the surrounding property owners contended that the particular kind of relief which had been granted by the Board of Appeals, was beyond the power and beyond the authority of the Board of Appeals and the complaint was as to this action on the part of the Board of Appeals.

This entire case of *The State of New York ex rel. Sheldon vs. The Board of Appeals,* acknowledged the validity and the constitutionality of the Zoning Ordinance and of the Board of Appeals.

In the wake of these three outstanding New York decisions so rendered by the highest court of that state, there

have been a tide of rulings—each one recognizing and conceding the validity of the Zoning Ordinances not only of the city of New York itself but of other cities throughout the state of New York.

A mere noting of these decisions would require several pages and therefore we refrain from further citations from this state, in reference to court rulings upon Zoning Ordinances themselves, each of which decisions have been in favor of the constitutionality of the Zoning Ordinance of such cities as Rochester, among the larger and among the smaller municipalities as well.

See also 158 New York Supplement, at page 162, *in re Russell,* decided in 1916, and *People ex rel. The Publicity Co. vs. Ludwig as Superintendent,* 218 N. Y. 240, decided in 1916.

In 209 Appellate Division Reports 151 (N. Y.) decided in May 1924, the Court wrote:

> "It is not attempted, and, indeed, at this late day, it would be idle to attempt to impair, whittle down or set at naught 'zoning ordinances,' which in no wise transcend constitutional limitations or the power delegated by the Legislature. Such ordinances, when ordained in pursuance of a legislative grant of power to a municipality and operating without discrimination between property owners, are a lawful exercise of police power."

Since the original dictation of this brief, the highest court of New York, speaking through its Chief Justice, Hiscock, on November 24th, 1925, in the cause of *Wulfsohn vs. The Inspector of Building of Mt. Vernon N. Y.*—has written perhaps its most forceful decision in complete support of these zoning ordinances. Search of Law Reviews and the Northeastern Reporter does not as yet disclose a *printed* report of this decision.

MASSACHUSETTS DECISIONS REGARDING ZONING ORDINANCES.

MASSACHUSETTS has spoken on the CONSTITUTIONALITY of these property limitation cases.

In the briefs heretofore filed by Counsel for the Appellants, we were always compelled to content ourselves with such inferences and with such deductions as could very reasonably and properly be drawn from the Opinion of the Justices of the Supreme Court of Massachusetts, rendered in May 1920 and found in 234 Massachusetts 597. This Opinion was rendered in answer to the query of the legislature of Massachusetts and in this opinion the Supreme Court of that state gave very favorable replies, supporting the constitutionality of comprehensive Zoning Ordinances.

Thereupon the legislature of Massachusetts passed an Enabling Act and under this authority, many municipalities of Massachusetts, including Boston, adopted comprehensive Zoning Ordinances.

In the path of these comprehensive Zoning Ordinances, three cases arose and found their way to the Supreme Court of Massachusetts, so that there were presented not merely the moot questions ruled upon in the Opinion of the Justices, but there were actual parties before the court.

On October 18th, 1924, in the cause of the *Building Inspector of Lowell vs. Stoklosa*, 250 Mass. 52, and 145 Northeastern Reporter page 262—the Massachusetts Supreme Court held that Zoning Ordinance virtually identical with the Ordinance in Euclid Village—was constitutional and legal.

Again in the case of *Spector vs. the Town of Milton*, found in 250 Mass., 63 and 145 Northeastern Reporter page 265 and likewise decided in October 1924, the Supreme Court of Massachusetts ruled that the Zoning Ordi-

nance of Milton, Massachusetts, was in conformity with the constitution of the state of Massachusetts as well as in conformity with the *Federal* Constitution and it upheld the prohibition of a *business* building or *store* in a certain district which had been designated, by the Zoning Ordinance, as intended for residential purposes alone.

Then came the third case, *Brett vs. the Building Commissioner of Brookline,* found in 250 Mass., 73 and 145 Northeastern Reporter 269, wherein the court again unanimously ruled and this time it held that the Brookline Zoning Ordinance which forbade two family or multi-family houses from being constructed in a so-called "*single family*" district, to be a valid and constitutional regulation and *not* to be within the realm of its being said that it has no rational relation to public safety, health or welfare.

It may be attempted to be argued that because the constitution of the state of Massachusetts was amended so as to permit of Zoning that therefore these decisions of the Massachusetts court do not apply in other states.

However, in answer to such a possible contention, it ought to be said that the Federal Constitution has not been amended in respect to Zoning and yet—in the plainest of language—the Supreme Court of Massachusetts held that neither the constitutional amendment of Massachusetts itself nor the Enabling Act of Massachusetts were in violation of the *Federal* Constitution and from this it must be apparent that the Supreme Court of Massachusetts had not merely ruled that the Zoning Ordinance was constitutional because of the amendment to the Massachusetts Constitution but, the ruling is that the Ordinance, in the opinion of the Massachusetts Supreme Court, is not in contravention of the *Federal* Constitution.

If further evidence of this were needed it may be found from the fact that in the first case above—*Building*

Inspector of Lowell vs. Stoklosa—the Supreme Court of Massachusetts set forth that it would *not* feel itself bound to follow its advisory opinion rendered several years before in 234 Massachusetts 597 but that, after most careful reconsideration, the court now was (Page 263): "Without further present discussion, summarization, amplification, restatement or paraphrase, ready to adopt the advisory opinion as to the judgment of the Court in the case at bar."

"The advisory opinion covers every constitutional phase which has been argued or which has occurred to us," said the Court.

And that advisory opinion was rendered *before* there was any constitutional amendment in Massachusetts and furthermore the court specifically held that in its opinion, these Zoning Ordinances were not in conflict with the Federal Constitution—See Syllabus 3, page 262 of 145 N. E. Reporter, 250 Mass., page 52; and as the Federal Constitution has not been amended in respect to Zoning Ordinances, it may well be said that any effort to classify the recent Massachusetts decisions as being under the Massachusetts Constitutional amendment alone, is not a proper or fitting contention, but that, on the contrary, the Massachusetts decisions are out and out declarations in favor of the constitutionality of these comprehensive Zoning Ordinances when considered in the light of the *Federal* Constitution.

It is to be further noted that the reasoning of the Massachusetts court throughout the entire opinion—is a reasoning showing the affinity between Zoning Ordinances on one hand, and the health ad safety and general welfare on the other hand, and such a line of reasoning would not have been necessary or called for if the Court had been determining the entire question upon the Massachusetts constitutional amendment alone.

The Massachusetts decision was rendered *subsequent* to the ruling of the District Court in the case at bar, and so the Massachusetts Court had the Euclid Village decision before itself, and yet—as is evident from *Building Inspector of Lowell vs. Stoklosa,* at bottom of page 263 of 145 Northeastern Reporter (page 60 of 250 Mass.) the Supreme Court of Massachusetts declined to follow the ruling of the Federal District Court in the *Euclid* case.

And it did not rest this declination upon any mere basis of the Massachusetts constitutional amendment alone, but further upon the basis of a refusal to follow the reasoning itself as set forth in the opinion of the District Court in the Euclid Village decision.

The Court said at page 611 of 234 Mass.:

> "We are of opinion that the proposed statute cannot be pronounced on its face contrary to any of the provisions of the Federal Constitution or its Amendments. The segregation of manufacturing, commercial and mercantile business of various kinds to particular localities, when exercised with reason, may be thought to bear a rational relation to the health and safety of the community."

Here the proscription of a *store* from a *residence* territory was, by the Massachusetts Supreme Court, held to *be* reasonable.

The Trial Court in the case at bar said (lower part of page 60 of the Record) in part: "The Opinion in 234 Mass. 597, was given to the legislature and is not an authority." This can no longer be said because that entire opinion has since been adopted in the above three cases and the Massachusetts Court has added even additionally emphatic expressions; and that too, despite admitted possible damage.

We invite the Court's attention to the following Massachusetts cases:

193 Massachusetts, 364, *Welch vs. Swasey,* decided in 1907.

This was a case which forbade buildings from being erected beyond a certain height, in certain parts of Boston and beyond a greater height in other parts of Boston. The court has held the entire ordinance constitutional as an exercise of police power and also held the delegation of the power to a Commission to be a constitutional delegation and not to be a delegation as to legislation.

This last ruling is important as to our Board of Appeals and is found in the 3rd paragraph on page 365. The court said that this was but a delegation of an administrative duty under direction of the law itself.

This case was unanimously affirmed in May 1909, in 214 U. S., page 91, in an opinion written by Justice Peckham at pages 103 to 108.

178 Massachusetts, 199, *Parker vs. Commonwealth,* decided in 1901.

174 Massachusetts, 476, *Attorney General vs. Williams,* decided in 1899, is an outstanding and important case and sustains the Boston Height Ordinance as a proper and constitutional exercise of Police Power.

136 N. E. Reporter, page 338 or 242 Mass., page 30, *Ayer vs. Cram et al.,* decided on June 30th, 1922, is a decision in favor of the Boston Zoning and Height Code.

This case clearly supports the Board of Appeals.

This case also supports the Zoning Ordinance.

NEW JERSEY DECISIONS.

New Jersey decisions are at least partially opposed to these ordinances.

When the first New Jersey adverse decisions were rendered, the State Enabling Act was—unlike that in Ohio—somewhat vague and indefinite and made up of a patchwork of Zoning and Enabling Acts, when its highest court decided that stores could not be excluded from residence districts by Zoning—*State ex rel. Ignaciumas vs. the Town of Nutley*, decided May 21st, 1924, and reported in 125 Atlantic Reporter, page 121.

The court in that instance purposely stated that it was *not* ruling that the Nutley Zoning Ordinance was in violation of the Federal or New Jersey Constitutions.

But apparently the adverse attitude of the New Jersey courts must be conceded as is evident from the list of cases, no one of which holds the Zoning Ordinance to be in contravention of the State or Federal Constitutions, but each of which holds that the respective prohibitions are not related to public health, safety and general welfare. These cases must be conceded as holding that Zoning Ordinances are not within the Police Power because they have no relationship to the public health, safety or welfare and, though they purposely have declared that they are not founded upon any contravention of the New Jersey or Federal Constitutions, we concede that they are against Zoning coming within the theory of the exercise of the Police Powers.

Among these adverse decisions which so held, the following may be listed:

Handy vs. the Village of South Orange (decided in February 1922, and found in 113 Atlantic Reporter, page 838), and *Ignaciumas vs. Risley* (decided on August 15th,

1923) and reported in 98 N. J. 712 (121 Atlantic Reporter 783).

Other than the original Nutley decision hereinabove first quoted, none of these rulings were by the highest court of the State of New Jersey, for all of the others were by the Supreme Court of that state.

In 127 Atlantic Reporter, page 785, *Max vs. the Building Inspector of Jersey City,* decided on February 26th, 1925, the Supreme Court of New Jersey held that a prohibition against the erection of a garage within a certain distance of a private dwelling was a proper exercise of the Police Power and was related to the health, safety and general welfare of the community, but that, we believe, was more founded upon its being a prohibition of what would come within a "nuisance" rather than being founded upon the greater and broader powers claimed under a comprehensive Zoning Ordinance and therefore we do not believe this decision to be opposed to the general line of adverse decisions to be found in the State of New Jersey.

Very recently the legislature of New Jersey, sensing the State wide demand for Zoning, recognizing the benefits therefrom and appreciating that one city after another throughout the state had adopted comprehensive Zoning Ordinances, passed a new Zoning Enabling Act and gave the proper power to the Boards of Adjustment (usually called the Board of Appeals in most cities) and there may now be a possibility of more favorable decisions.

As a result of one prior amendment which created and gave some power to the Board of Adjustment, the very same courts of New Jersey have somewhat modified their attitude by compelling litigants to *first* resort to and to *first* have recourse to the Board of Adjustment, *before*

coming into court. See *Falco vs. Kaltenbach*, 128 Atlantic Reporter, page 397, Syllabi 1, 2 and 3.

Now with the newly created State Enabling Act, it may be possible to expect even further favorable inclinations and rulings as to the entire subject of zoning.

Up to the present time, New Jersey has not squarely decided the Constitutional question.

One favorable lesson can be drawn from the New Jersey situation and that is the fact that even after adverse rulings of its State Court, many additional municipalities, realizing the benefits which New York and other neighboring cities in Connecticut and elsewhere have obtained from comprehensive Zoning Ordinances, have trustfully adopted comprehensive Zoning Ordinances, even within this very current year, so that, according to the Department of Commerce, New Jersey has the greatest number of zoned cities of any State, it having over 70 zoned municipalities.

Schaite vs. Senior, 117 Atl. R. 517 and *Cliffside Park Co. vs. Cliffside*, 96 N. J. L. 278, are not decisions favoring zoning, but we believe that they indicate a more favorable attitude and a more recent tendency toward supporting zoning.

MARYLAND DECISIONS.

In the case of *Goldman vs. Krowther*, Inspector of Buildings for the City of Baltimore, Maryland, reported in Volume 128 Atlantic Reporter, page 30, and decided in February, 1925, the highest court of the State of Maryland, by a divided opinion, held that the Zoning Ordinance of the City of Baltimore was not legal or valid. This decision held that a tailor shop could not be prohibited in a residence district in the City of Baltimore.

It may be of some moment and worth while to here point out that the State of Maryland does not have an Enabling Act but that, on the contrary, the City of Baltimore enacted its Zoning Ordinance under its so-called Home Rule Charter which merely authorized the *control of trades.*

Conceding everything that can be claimed for this decision, it nevertheless can not be fairly said that an *industrial* plant or factory prohibition in a residence territory would have no relationship to health, safety and general welfare, for it is common knowledge and the record in the Euclid Village cause is replete with proof that industries and factories *do* the very thing which the Supreme Court of Maryland held a tailor shop would not do, namely: "There is nothing in the record from which it can be inferred that such (tailor shop) use is offensive to the eye, the ear or the nose of a person of ordinary sensibilities, or that it imperils the public health, welfare or safety." (Page 61 of 128 Atl. Rep.)

Even the Maryland court admits that it is troubled and put in doubt by the conflicting results when it considers the Baltimore Ordinance from the standpoint of legality alone as contrasted with an approach by way of welfare and economic avenues (page 61). We can not refrain from wondering—aloud—whether this is not another instance similar to the New York situation in the case of *State of New York vs. Davis Williams,* decided in 189 New York 131, where the Supreme Court of New York was unable to find its way clear to support the so-called Labor Code, but where—after an elapse of a few years —the Supreme Court of New York frankly and plainly reversed itself and in the case of *People vs. Schweinler,* reported in Volume 214, page 395 of the New York Reports, emphatically validated this very same Labor Code.

After all, law is not abstract for it covers and it rules and it shapes the living conditions and the course of millions and this multitude is not an abstract number, but is, on the contrary, made up of real human beings who must endure real conditions and who, collectively, constitute our cities, our states and our very Union itself.

In Minnesota, Louisiana and one other state—as hereinafter cited—these very Zoning Ordinances were first held to be illegal just as has recently been held by the Supreme Court of Maryland and yet—within the course of a very few years—men have assumed their places upon the Supreme benches of these states and these men have in no uncertain terms declared that it is their earnest judgment and their honest opinion that comprehensive Zoning Ordinances are constitutional and are valid and so these states are today in the affirmative column.

May not Maryland experience the very same result?

It should be remembered that this Maryland decision is not founded upon any Enabling Act but is based on the very limited City Charter right to but "*Control trades.*"

The Court is respectfully asked to read the strong and able dissenting opinion of Chief Justice Bond in this Maryland case; Justice Urner concurring; where Justice Bond said:

> "May it not be that the stresses and strains of living in a large modern city, with all its complex activities, have grown to a point where the separation of business from dwelling places, offers a material, or even necessary aid in the maintenance of the health and vigor of the city population? May it not be that in the growth of our predominantly industrial civilization we have arrived at a point where special protection is needed for the mere business of living?"

MISSOURI DECISIONS.

In the case of the *City of St. Louis vs. Evraiff*, decided on October 6th, 1923, 301 Mo. 231 and 256 Southwestern Reporter 489, appears to lay down the rule that the Missouri Supreme Court has held the St. Louis Zoning Ordinance to be unconstitutional in so far as it forbids a non-nuisance business to be located in a residence territory.

The reasoning of the Court is clearly to the effect that such a proscription is unconstitutional, but it is a fact—as pointed out by the court at the top of Page 491—that this Ordinance was enacted not upon authorization of any State Enabling Act but was enacted without such an act and was based upon the St. Louis *charter alone*, and it is further a fact that this charter, as quoted by the Court itself, merely authorized the prohibition of specified *nuisances* and the "regulation or prohibition of any business which may be *dangerous* or *detrimental* to the public health."

Though we concede that the reasoning of the court is adverse to the constitutionality of the Zoning Ordinance, yet it is equally apparent that the charter provision was by no means as broad or as comprehensive in its authorization as are the State Zoning Enabling Acts such as obtain in New York, Massachusetts, Ohio and in a great majority of the States of the Union.

It is to be further noted that this decision was concurred in by four of the judges and dissented from by three other members of the court.

In the succeeding case of *State ex rel. Better Built Home and Mortgage Company vs. McKelvey*, found in 256 Southwestern page 495 and decided on the same day as the decision in the *St. Louis* case, *supra*, the court likewise held the St. Louis Zoning Ordinance to be invalid.

In that case however, only 3 of the judges concurred in the opinion, one judge concurred in the result alone and three of the judges dissented.

In the case of *State ex rel. Penrose Investment Company vs. McKelvey,* found in the same Volume 256 Southwestern at page 474 and 301 Missouri 1 and decided on the same day, the court similarly held the St. Louis Zoning Ordinance invalid and it again referred to the limited power of the City of St. Louis as prescribed in its *charter* (page 476) and in this decision three of the judges again concurred, one judge concurred in the result and three of the judges dissented.

May we ask the Court to read the dissenting opinion of Justice White, which appears on page 479 of Volume 256 of the *South Western Reports,* 301 Missouri at 26.

Mr. Newman F. Baker, in an article wrote, in part as follows:

> "The court held that the attempt to zone was contrary to the Missouri Constitution, which contained the words 'private property shall not be taken or damaged for public use without just compensation.' It should be noticed that the city's ordinance was passed under the charter powers and was not authorized by an enabling act."

The dissenting opinion by Justice White is a very able argument in favor of zoning. He says:

> "The great weight of authority, both Federal and State, is to the effect that a reasonable zoning ordinance is constitutional and the determination of what is reasonable varies with changing conditions, incident to modern development and civilization."

The effect of this decision was to produce chaos in St. Louis as well as other communities of the state. A flood of speculative building was released and "it has done incalculable damage to neighborhoods and districts."

AS TO TEXAS' POSITION.

The *Texas case of Spann vs. City of Dallas,* 111 Texas 350, 235 S. W. 513, is often cited as showing that zoning is unconstitutional, but it is misleading to call this a "zoning" case. Here we find a city ordinance prohibiting the construction of a business house within a residence district, except on permit granted with the consent of three-fourths of the property owners within a radius of three hundred feet and in accordance with a design approved by the building inspector. The ordinance defined a residence district to be "any part of the city where there are more dwelling houses than business houses within a radius of three hundred feet from the place where any business house, intended for the barter and sale of goods and merchandise of any description or for the conduct of any business, is sought to be constructed." The city urged that this was but a rightful exercise of its police power as conferred by a general charter provision granting it the authority to protect by ordinance "health, life and property," abate nuisances, preserve and enforce "the good government, order and security" of the city and to protect "the lives, health and property of its inhabitants."

We should remember that this was a "block" ordinance based upon the general grants in the city's charter, that the "zone" was not definitely bounded and that the consent of three-fourths of the adjoining property owners was necessary in order to erect a business house. The court correctly held this ordinance invalid, but this type of case should not be cited as bearing upon the constitutionality of the "modern," carefully drawn, and legally authorized zoning ordinance.

While the case was before the Supreme Court, the legislature made a specific grant of the right to zone.

Thirty days after the verdict, Dallas made amendment to her charter to give the commissioners the right to zone and a new ordinance was drawn expressly to cure the defects of the old. We should note that this ordinance did not contain the provision requiring the consent of three-fourths of the adjacent property owners. But in the case of *City of Dallas vs. Mitchell,* 245 S. W. 944, we find the court deciding upon the basis of the *Spann* case.

Having cited the Court to the favorable decisions of New York and Massachusetts and to the at least partial if not completely adverse attitude of the courts of New Jersey, Maryland, Missouri and Texas, we now wish to invite the Court's attention to those additional states which have ruled favorably in reference to comprehensive Zoning Ordinances, such as the ordinance in the case at bar.

CALIFORNIA FAVORS ZONING.

Beginning at the westerly coast, with the State of California, it is found that the opinion of the Trial Court in the case at bar (at upper portion of page 317 of 297 Federal Reporter) refers to the decision rendered by one of the subordinate courts of the State of California in December 1923.

The Trial Court in the case at bar pointed out that the counsel for the Village of Euclid has cited this California case, *Miller vs. the Board of Public Works,* as being favorable to zoning whereas the Opinion on page 60 of the Record, indicated that this case was decided by the subordinate court, adversely to zoning.

In 234 Pacific Reporter in the second column of page 382, the Supreme Court of Califronia wrote:

> "The Trial Court held said ordinance to be a valid exercise of the Police Power of the municipality

and *denied* the writ of mandate sought by the plaintiffs. From this judgment plaintiffs appeal."

This case is reported in 234 Pacific Reporter 381, decided February 27th, 1925; re-hearing being denied March 1925.

The constitution of California, as quoted at the top of page 383, give to this municipality almost the exactly worded powers which are contained in Article XVIII, Section 3 of the Ohio Constitution.

Supreme Court Justice Lennon in announcing the opinion in which all of the Associate Justices concurred, spoke in part as follows:

"What was at one time regarded as an improper exercise of police power may now, because of changed conditions, be recognized as a legitimate exercise of that power. * * * In its inception police power was closely concerned with the preservation of the public peace, safety, morals and health, without specific regard to the 'general welfare.' The increasing complexity of our civilization and institutions later gave rise to cases wherein the promotion of the public welfare was held by the courts to be a legitimate object for the exercise of police power. As our civic life has developed so has the definition of 'public welfare' until it has been held to embrace regulations 'to promote the economic welfare, public convenience and general prosperity of the community.' In brief, 'there is nothing known to the law that keeps more in step with human progress than does the exercise of this power.'

"So thoroughly has the value of zoning been demonstrated that no longer is the constitutionality of the principle open to question. The books abound with cases upholding the constitutional right to zone and sanctioning the principle upon which that right is founded."

In the succeeding case, *Zahn vs. the Board of Public Works of Los Angeles,* decided in March 1925, the Petitioner desired a permit to construct a business building in a district zoned for residential purposes under the Los Angeles Comprehensive Zoning Ordinance.

We invite the attention of the Court to Syllabi 3, 5, 7, 9, 10 and 11 at pages 388 and 389 of 234 Pacific Reporter; the court in the concluding Syllabus having said:

> "We are well satisfied that the weight of authority dealing with the subject of zoning may now be regarded as establishing that every intendment is to be made in favor of zoning ordinances, and the courts will not, except in clear cases, interfere with the exercise of power thus manifested."

In the case of *Blumenthal vs. Cryer,* decided in 1925 by the District Court of Appeals of California, the District Court followed the two above decisions of the Supreme Court of that State and held the comprehensive Zoning Ordinance constitutional.

Not claiming that either of these cases are upon the subject to zoning, we cite the Court to *Hadachek vs. Sebastian,* 239 U. S. 394, and *Ex Parte Quong Wo,* 161 Cal. 220, because in these cases the Federal and the California Supreme Courts have so well pronounced the doctrine to the effect that damage alone does not necessarily make an exercise of the Police Power unreasonable or unconstitutional and that the legislative department in the first instance at least, is vested with the power to determine the propriety of the application of this power and the necessity therefor. We do not cite these cases as authority upon zoning, but we refer the Court to them because of their clear declarations of some of the fundamental principles which underlie the subject of zoning.

KANSAS HOLDS ZONING TO BE CONSTITUTIONAL.

Tracing our path but a little further eastward we reach the State of Kansas where the courts have been called upon to rule in reference to the comprehensive Zoning Ordinances of several municipalities in that State, each one ably defended by Mr. George Siefkin.

In 113 Kansas 153 (214 Pacific 99), *Ware vs. the City of Wichita*, the court in upholding the comprehensive Zoning Ordinance enacted under the Kansas Enabling Act, said in part:

> "The next contention is that the Zoning Ordinance and the statute which authorize it have the effect of taking Defendant's property or of diminishing its value without compensation. It often happens that a valid exercise of the Police Power has such effect. The most common examples of this are found in statutes and ordinances relating to the health, safety or morals of the people."

Then came the case of *West vs. the City of Wichita* (decided in 1925), 234 Pacific 978, which re-affirmed the constitutionality of comprehensive Zoning Ordinances in the State of Kansas.

IOWA IS FAVORABLY INCLINED.

Though the comparatively recent case of *Des Moines vs. Manhattan Oil Company*, 193 Iowa 1096, is not exactly a zoning case, yet it is closely akin thereto in many respects and the reasoning of the Court is to a great extent pertinent to the subject of zoning. The study of this subject would not be thorough or complete without a reading of the text of the decision in this case.

LOUISIANA FAVORS COMPREHENSIVE ZONING.

It was the invariable practice of the opponents of Zoning to cite the case of *Calvo vs. the City of New Orleans,* 136 Louisiana 480 (67 South. Rep. 338, decided in 1925), as well as the case of the *State ex rel. Blaise vs. the City of New Orleans,* 142 Louisiana 73 (76 South. Rep. 244, decided in June, 1917) as indicative of the unconstitutionality of the comprehensive Zoning Ordinance of the City of New Orleans.

It seemed quite apparent to those who favored Zoning that both of these decisions were adverse merely and solely because the City of New Orleans had attempted to enact a Zoning Ordinance under its mere charter rights and not by virtue of any Enabling Act of the State. This was evident from the simple statement of the Supreme Court of Louisiana where it declared that "The Legislature did not intend to give the New Orleans Commission council any such right in the charter section quoted."

While these decisions were unjustifiably being cited as indicating an adverse position, in reference to Zoning, the Legislature of Louisiana did pass an Enabling Act and in the wake of this act, six separate cases reached the Supreme Court of Louisiana and were decided under one title, *State ex rel. Civello vs. the City of New Orleans,* decided on July 11th, 1923, and found in 154 Louisiana Reports 271 (97 South. 440).

The particular question in issue in the leading one of these six cases was the exclusion of stores from a residence neighborhood.

In this decision the Supreme Court of Louisiana, in referring to the *Calvo* and the *Blaise* cases, tersely declared that those two cases had merely determined that the charter provision of the City of New Orleans was not sufficient authority for the enactment of a so-called Zoning

or proscribing Ordinance. Then, coming to the important constitutional question which was now being presented to the court because an Enabling Act had since been enacted by the State Legislature of Louisiana, the Supreme Court of Louisiana said that:

> "In so far therefore, as the *Calvo* and the *Blaise* decisions maintain that a municipal Ordinance proscribing business establishments generally in a designated residence street or district as essentially only a matter of aestheticism, and can not be sustained upon considerations of public health, safety, comfort, or the general welfare, the two decisions are now overruled.
>
> "It is not necessary, for the validity of the Ordinances in question, that we should deem the Ordinances justified by the considerations of public health, safety, comfort, or the general welfare. It is sufficient that the municipal council could reasonably have had such considerations in mind. If such considerations could have justified the Ordinances, we must assume that they did justify them."

From the date of those decisions there can no longer be any doubt of the fact that the highest court of the State of Louisiana has, in company with New York and Massachusetts already cited and in company with the many other states hereinafter cited, ruled that there is such possible relationship between the health, safety and general welfare of the community on the one hand, and these Zoning Ordinances on the other hand, as to be legal and valid under the Federal Constitution itself.

Indeed, at page 278 of the *Civello decision*, 154 La., the Louisiana Court stated that the legality of these Ordinances could not be doubted under the Louisiana Constitution itself and that the sole question was in reference to the legality under the *Federal* Constitution and upon this point the Court clearly ruled that in its judgment these

Ordinances are *not* in conflict with the Constitution of the United States. And this ruling was made notwithstanding admitted damage.

CONNECTICUT.

Here the court will find another recent decision.

It concerns itself with a "Set-back" provision.

In 95 Connecticut Reports 357, *Whitney vs. the Town of Windsor,* decided in August, 1920, the Supreme Court of Connecticut held this set-back provision of this platting ordinance, to be Legal and Constitutional, even though it admitted that this limitation did "take" or restrict the property.

Syllabi 2 and 3 depict the whole situation and enunciate the opinion and the decision of the court:

> "That while the Act did not take land, but merely regulated its use by requiring conformity to the plan of the commission in its development, such regulations nevertheless did in a measure deprive the owner of a part of his dominion over his land.
>
> That such restriction or deprivation, accomplished under reasonable regulations in the conservation of the public health, safety and welfare, was merely a legitimate exercise of the police power of the State as distinguished from the power of eminent domain.
>
> Eminent domain takes property because it is useful to the public; the police power regulates the use of property or impairs rights therein because the free exercise of these rights is detrimental to the public interest. The line between these two powers is a difficult one to hold, and it is not surprising that they have occasionally been confused.
>
> The 'due process' clause of the 14th Amendment of the Federal Constitution does not prevent the

State from making all needful regulations for the public welfare, nor does it require compensation to be made, in case these regulations are reasonable, although they do restrict the owner in the use of his property.

The State may regulate any business, or the use of any property, in the interest of the public health, safety or welfare and without making compensation, provided this is done reasonably.

The General Assembly in the exercise of the police power can establish building lines without making compensation where, as in this case, the regulations are reasonable under the circumstances present, and tend to preserve the public health, add to the public safety from fire, and enhance the public welfare by bettering living conditions and increasing the general prosperity of the neighborhood."

This ordinance was founded on a quasi-compensation basis, but the reasoning is pertinent to the question at bar.

When in our citations we copy only certain parts, we do not do so to conceal anything in the uncopied portions and we ask the Court to read this and other partially quoted cases.

DISTRICT OF COLUMBIA FAVORS ZONING.

Having started at the Pacific and gone eastward, we now find ourselves in the City of Washington D. C., where Congress has enacted a comprehensive Zoning Ordinance substantially identical in wording with that of Euclid Village.

In the case of *Schwartz vs. Bronlow*—decided in 1921 by Associate Justice Van Orsdel and reported in 50 Appeal Cases, District of Columbia, the Congressional Zoning Act was inferentially held to be valid because the court ruled that since this enactment the authority of the Commis-

sioners of the District of Columbia had been superseded by the Congressional act which empowered a special "Zoning Commission" to enforce the Zoning Act.

In a decision written July 6th, 1925 in the case of *Steerman vs. Oehmann,* Inspector of Building and the Zoning Commission, by Mr. Justice Jennings Bailey of the Supreme Court of the District of Columbia, the validity of the Zoning Act was sustained. In its opinion this Court wrote in part, as follows:

> "In my opinion, the zoning law is within the constitutional power of Congress, being included in the police power as defined by the Supreme Court in *C. B. & Q. Railway Company vs. Drainage Commissioners,* 200 U. S. 561.
>
> "The particular provisions of the zoning regulations attacked in this case, those prohibiting business houses in residential sections, are in my opinion designed to promote the public convenience as well as the public health and safety, and this I find to be the case, both as a matter of common knowledge and from the testimony introduced by the defendant.
>
> "It may be true that the zoning law or the zoning regulations may, as general laws usually do, work an injustice in particular instances, but they are not unconstitutional for that reason. It is true, too, that there might be some form of business which might be conducted in relator's property without injury to the public convenience or health or morals, but where the general policy of the law is within the powers of the Legislature it is also within its powers to determine the questions of fact upon which its legislation is based and to prescribe general rules designed to carry out its purpose and where there is nothing arbitrary or unreasonable in its determination of those facts the courts are bound by its acts."

The brief of Mr. Edward M. Bassett in this case is a worthy contribution to the subject of Zoning.

MINNESOTA FAVORS ZONING.

Retracing our steps and going toward the Northwest, it is found that the state of Minnesota is reported by the Trial Court in the case at bar (at the middle of page 317 of 297 Federal Reporter) as being in the column opposed to Zoning.

The situation as we understand it is as follows:

In the case of *State ex rel. Banner Grain Company vs. Houghton,* decided February 1919, the court refused a writ of mandamus against the Inspector and in its concluding paragraph said:

> "The area is practically level, sparsely settled and largely covered with brush and trees. The right of way of the main railroad company extends from the southeast to the northwest across the district, upon which there is a main and several side or storage tracks. The lots along the right-of-way are well adapted for industrial purposes, but we see no reason why the area in general might not be suitable for residential purposes and it has been so designated by the proper tribunal."

The next case arising in this state was under a quasi-condemnation plan: *State ex rel. Twin City Building Company vs. Houghton,* decided later in 1919 and reported on page 1 of 144 Minnesota Reports.

This decision rendered in 1919 held that this quasi-condemnation plan could not be employed to keep an apartment building out of a residence territory, because such a purpose was not for a public use.

However, during January 1920, this same case was re-argued with result that on page 20 and 21 the court wrote the following:

> "People are beginning to realize this more than before and are calling for city planning, by which the

individual homes may be segregated from not only industrial and mercantile districts, but also from the districts devoted to hotels and apartments. The act in question responds to this call and should be deemed to provide for a taking for public use.

The former opinion rendered herein is *overruled.*"

On July 3rd, 1925 in the case of *State Ex Rel. Beery vs. Houghton, Inspector,* reported in 204 Northwestern Reporter 569, the Supreme Court of Minnesota plainly sustained zoning, for it spoke as follows:

"By the comprehensive zoning ordinance of Minneapolis a district is created in which the erection of four-family flat buildings is prohibited. The relator's property is in that district. The ordinance was enacted under the authority of Laws 1921, c. 217, as amended by Laws 1923, c. 364. Whether the ordinance is constitutional is the question.

The trend of the authorities is in the way of sustaining legislative regulations.

We hold that a fair zoning ordinance resulting in the exclusion of a *four-family flat* building from a designated *residential* district is constitutional. This holding is not in harmony with our earlier decisions. It is directly opposed to the result reached in *State vs. Minneapolis,* 136 Minn. 497. But as before stated, the last prevailing opinion in *State vs. Houghton,* 144 Minn. 1, 13, which established the law and nullified opposing individual opinions, was fundamentally opposed to some of the views made the basis of the denial of the right of exclusion under the police power in the earlier cases, though none of them were in terms overruled and perhaps should not have been. So far as in conflict with the view now adopted they are not to be followed."

WISCONSIN FAVORS ZONING.

Once more proceeding eastward we find that in the State of Wisconsin the Supreme Court, in the case of *State Ex Rel. Carter vs. Harper, Commissioner of Building of Milwaukee,* decided in 1923 and reported in 182 Wisconsin 148 and 196 N. W. 451, held Zoning to be legal.

Justice Owen at page 156 wrote:

> "The legislation authorizing so-called zoning ordinances is of comparatively recent origin, and it is not unnatural that those adversely affected should regard them as an unjust and unwarranted interference with their property rights.
>
> If such regulations stabilize the value of property, promote the permanency of desirable home surroundings, and if they add to the happiness and comfort of the citizens, they, therefore, promote the general welfare. We do not hesitate to say that the attainment of these objects affords a legitimate field for the exercise of the police power."

The next year, 1924, in the case of *Holzbauer vs. Ritter,* reported in 184 Wisconsin 35 and 198 N. W. 852. the court again upheld comprehensive zoning by holding that it was not creating an improper classification because the Ordinance provided for the exclusion of community *stores* from residential districts.

OHIO.

In our preceding delineation of State decisions, the terminus was in the City of Washington D. C. This eastward march finds its conclusion in the State of Ohio.

The case at bar comes from Ohio.

Recognizing that the Federal Court is not necessarily bound by the decision of the Supreme Court of a state when a Federal constitutional question is involved, yet it is true that the Federal Supreme Court has more than once

declared that especially in cases involving the exercise of Police Powers, a decision of the State court of last resort would be interfered with only in exceptional cases.

We urged before the Trial Court that the constitutional provision contained in Article XVIII, Section 3 of Ohio is self-executing and ought not really need any Enabling Act to effectuate it, and this thought has since been affirmed by the Supreme Court of Ohio in the case of *Perrysburg vs. Ridgway,* 108 Ohio State 245.

There may however have been usefulness in enacting an Enabling Act (Section 4366-1 to 4366-12 of the General Code of Ohio), for that act puts to rest all doubt as to the scope and breadth of authority which was delegated by the Legislature to all Ohio municipalities.

Thus, in Ohio there is a two-fold authorization.

THE FIRST COMPREHENSIVE ZONING CASE IN OHIO.

Because the case at bar comes from Ohio we take the liberty of tracing the Ohio decisions from the lower courts, upward.

In the case of *State of Ohio ex rel. Morris vs. Osborn, Inspector of Building of the City of East Cleveland,* decided in 1920 and reported in 20 N. P. (N. S. 549) the relator wished to mandamus the Building Inspector to issue a permit to erect an apartment house in a district from which apartment houses were excluded by the East Cleveland comprehensive Zoning Ordinance, which was identical with the Euclid Village ordinance.

Though this case was the decision of but an inferior tribunal, the cogent reasoning of Judge Kramer and its logical presentation has caused it to be quoted from coast to coast.

The court refused the writ and in part said:

"No one today, I take it, would question the right of a municipality, under its police power, lawfully to limit to certain districts slaughter houses, corrals, livery stables, laundries, carpet-beating establishments, etc. Not only would we consider that there was no question that this might lawfully be done but we would consider that there never could have been any question that it could be done. Yet, the books disclose that the validity of the laws so limiting these industries were attacked in the courts upon precisely the same grounds as are urged against the ordinance here in question. The law, as laid down in those cases, is precisely the same as it is held today. The law has not changed, but the application of the law has kept pace with changed conditions, conditions both material and of public thought. The conditions have so changed, since it was considered, that the right of the state to interfere with the use of private property, even to the extent of limiting its use as a slaughter house, was debatable, that it is now held that regulations limiting the height of buildings, the material used in their construction, and all of other minute limitations of building ordinances, fire district ordinances, etc., are too well established to be questioned."

The Euclid ordinance, but one other time assailed, was upheld by the local Common Pleas Court in *Cormica vs. Euclid Village.*

Another suburb of Cleveland, Lakewood, Ohio, enacted an identical ordinance and this time the Court of Appeals was applied to for a writ of mandamus to compel the issuance of a permit to construct an *apartment* upon a lot located in a residential zone limited so as "to be occupied by not more than two families." The Lakewood ordinance was upheld by the Court of Appeals and the writ was refused.

In the next case, *State ex rel. Danzig vs. Durant,* decided in 1923, another Court of Appeals refused the writ, saying:

> "Now while it may be true that in the past many courts have held such ordinances (zoning) as violative of the property and personal rights of individuals as guaranteed by the Constitution, it is likewise true that the modern tendency has been more and more to sustain such enactments * * * But such enactments cannot be made without some sacrifice of the individual rights of the inhabitants."

The case of *Kahn Brothers vs. Youngstown* engaged the attention of the Supreme Court of Ohio and was decided May 19th, 1925, being reported in 148 N. E. R. 842. The regulation in that case was held to be unreasonable and the decision was hailed as a barrier against the Ohio Supreme Court ever holding Zoning to be legal.

It required but a glance to see that in the Youngstown case the council had declared a very small section of the municipality to be a "Residence District" and it attempted to ostracize from that district all buildings other than single families, for the mere purpose of maintaining the superior tone of that one exclusive section and *not* for any purpose of promoting or protecting the public health or safety or welfare.

The Supreme Court of Ohio plainly indicated that this was a mere "Block" ordinance and that it was not even a partial zoning ordinance nor, of course, was it a comprehensive Zoning Ordinance such as in the case at bar. Indeed, in the hereinafter cited favorable decision of the Ohio Supreme Court, *Pritz vs. Messer,* there is not even a reference to this Youngstown case because the court did not regard the Youngstown case as presenting any comprehensive Zoning Ordinance, for the court in the Youngstown case, said:

"In other words, this is not a comprehensive Zoning Ordinance but is a so-called 'Block' ordinance, relating only to a certain small district in the city of Youngstown."

And the Court rightly held this attempt as *un*related to any *genuine* purpose of protecting the health or welfare of the community.

Another cause to reach the Supreme Court of Ohio was that of *State ex rel. Bolce vs. Hauser, Commissioner of Building,* decided December 9th, 1924, 111 Ohio State Reports 402.

The Supreme Court of Ohio stated that another cause was then pending before it (meaning the hereinafter cited case of *Pritz vs. Messer*) and that it had intended to defer its decision until it took up the constitutional question presented by this cause, but that the *Bolce* case presented the mere question of whether an exempting clause contained in an amending ordinance would permit the owner to construct the building in question.

The Court held that the amending ordinance—known as the "Duttenhofer Ordinance" did apply and therefore it ordered the permit to be issued but at the middle of page 407 the Court said:

"We do not pass upon the constitutionality of the original Zoning Ordinance adopted April 1st, 1924."

PRITZ VS. MESSER.

Then the Supreme Court gave its attention to the important question of the constitutionality of comprehensive zoning ordinances and on May 19th, 1925 it announced its decision upon the basic question of constitutionality, in the case of *Pritz vs. Messer* which presented the comprehensive Zoning Ordinance of Cincinnati, Ohio.

The Belvidere Apartment Company and Frank Messer contemplated the construction of an apartment building in violation of the provisions of the Cincinnati Zoning Ordinance, "relating to height, dimensions, area and bulk of the building within a Residence 'C' Zone. None of the use regulations of the ordinance would be violated by the building contemplated."

Emelia Pritz, an adjoining owner, prayed for a restraining order and predicated her right thereto upon the Cincinnati Zoning ordinance.

First our Supreme Court gave its attention to the question of the height regulation which, for years and in every state, has been recognized as a valid exercise of the police power, and in reference to this phrase, our Court said:

> "It has long been held that provisions which restrict the height of buildings have a relation to the public health and safety, 97 O. S. 130, *State vs. Cunningham.*"

Next it considered and promptly agreed to the recognized right to limit the bulk of the building or occupancy of lots.

Then, addressing itself to the more involved and the new question of the right to zone, the Court said:

> "The question here raised for the first time in Ohio is whether municipal authorities may definitely divide and zone a city, planning its development and regulating area, bulk, height and use of buildings differently in different districts."

The Supreme Court of Ohio, speaking through Justice Allen, stated that:

> "Since the answer of the defendant Messer attacks the constitutionality of the zoning ordinance the question is squarely raised whether, under the Con-

stitution of Ohio, and of the United States, a city can regulate building development and uses of property within its own boundaries according to zones or districts."

The counsel who are contending against the Euclid Village Ordinance presented a worthy brief as *Amici Curiae*, opposed to the validity of the Cincinnati ordinance. So that the Supreme Court had the opposing contentions of the present counsel in full, and in this brief were repeated references to *Pennsylvania Coal Company vs. Mahon*.

The Ohio Court had the further benefit of the ruling of the Trial Judge in the case at bar which had been rendered more than a year before and which was extensively quoted in the brief of the *Amici Curiae*. The Ohio Supreme Court—we believe it fair to say—did not share the view of the District Court in the case at bar.

The several briefs filed in this cause by Mr. Alfred Bettman are splendid expositions of the law relating to this subject.

This case is reported in the paper bound Advance Sheets of the 149 *North Eastern Reporter*, Volume 1, page 30, November 1925.

The Cincinnati Zoning Ordinance is comprehensive and is, in substance, identical with the one at bar.

The Answer of the Supreme Court to this question so "squarely raised as to whether a city can regulate building development and uses of property according to Zoning or Districts," is found in the Syllabus which reads as follows:

"1. Laws enacted in the proper exercise of the police power, which are reasonably necessary for the preservation of the public health, safety and morals, even though they result in the impairment of the full

use of property by the owner thereof do not constitute a taking of private property within the meaning of the constitutional requirements as to making compensation for the taking of property for public use or as to the deprivation of property without due process of law.

2. An ordinance enacted by a municipality under Article XVIII, Section 3 of the Ohio Constitution and under Sections 4366-1 to 4366-12, General Code dividing the whole territory of the municipality into districts according to a comprehensive plan which, in the interest of the public health, public safety and public morals, regulates the uses for trade, industry, residence or other specific uses, the height, bulk or location of buildings and other structures thereafter to be erected or altered, including the percentage of lot occupancy, setback building lines, and the area of yards, courts and other spaces, and for such purpose divides the city into zones or districts of such number, shape, and area as are suited to carry out such purposes, and provides a method of administration therefor and prescribes penalties for the violation of such provisions, is a valid and constitutional enactment."

We are very desirous of quoting page after page from this decision but we must content ourselves with a quotation of the Syllabus alone for the Syllabus in Ohio is the law of the case and because we know that—this being the pronouncement of our highest state tribunal—the Court will wish to resort to the full text and—so that we may not leave any misinterpretation of any part of this decision—we refrain from further quoting and respectfully refer the Court to the decision in full.

We do not claim that this ruling of the Ohio Supreme Court is a blanket endorsement for every zoning restriction, nor do we contend that improper restrictions may find shelter under this decision, but we believe that the

highest tribunal of the State of Ohio has validated the right of municipalities to reasonably establish districts for use, regulations for height and limitations of bulk, and that the highest court of Ohio having so pronounced, its decision may have that effect which is best set forth in the words of Justice Clarke, in 242 U. S. at page 530:

> "The principles governing the exercise of the police power have received such frequent application and have been so elaborated upon in recent decisions of this court, concluding with *Armour and Co. vs. North Dakota,* 240 U. S. 510, 514, that further discussion of them would not be profitable, especially in a case falling as clearly as this one does within their scope. We therefore content ourselves with saying that while this court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely with the territory of the state enacting them, and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court of the state whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare. *Jacobson vs. Massachusetts,* 197 U. S. 11, 30. And this, for the reasons stated, cannot be said of the ordinance which we have here."

In the earlier part of this brief we endeavored to indicate that the limitation in question was not confiscatory, that it was reasonable, that it was closely related to public health, safety and welfare and that it not only did not lessen but that it really enhanced the value of the Complainant's land and that its use for industrial or commercial purposes would be distinctly inimical to the public welfare.

And this proof, as stated in the Opinion of the Trial Court, is equally as available to the Supreme Court because the testimony was taken outside of the court room and was submitted in but a typewritten manner.

We are trustful that the Court may, upon the evidence as well as upon the law, sustain the ordinance in question.

The length of this presentation is indulged in by Counsel only because this is apparently the first time the subject of Comprehensive Zoning has been presented to the Supreme Court.

We do not believe that the ordinance in its *entirety* is unconstitutional, as was held by the Trial Court, nor do we believe that in its application to *complainant's* land there is other than a proper and lawful regard for the public safety, health and welfare.

CONCLUSION.

When the Country was in its early state, the powder mill, the inn, the houses and the primitive stores were clustered together in "Town Centers."

As the population grew and as conditions unfolded themselves, one of the first steps to be taken was the banishment of the powder mill from the "Center" of the town to a more outlying district where its potential dangers might be less to the Settlers who were clustered in a group. Perhaps the next step was the ostracism of those occupations which were usually termed as "Common Law" Nuisances.

But even these steps were not sufficient to properly protect the public welfare and there then began to appear, year by year, a great variety of enactments against what has come to be commonly called "Statutory" nui-

sances. These have denied the right to brick kilns, to livery stables, to public laundries and to a long array of occupations to be located within residential districts. In each of these progressive and successive steps, the courts have recognized these proceedings as being wise and public-serving and although each of these steps has been assailed in proceedings from the humblest to the final tribunal of this land, the public interests have warranted the courts in pronouncing such steps to be for the public good and within the proper exercise of the Police Power.

Another phase of the necessity of Public Regulation presented itself when many who always believed they could build upon their land with such buildings and in such manner as they chose because they were the owners of their land and were protected therein by the Federal and State Constitutions, found themselves confronted with enactments which minutely regulated the building and construction if it came within the definition of a "Tenement House." For a moment the courts of even the enlightened state of New York hesitated in stamping their approval upon these enactments, but only a few years were required to elapse before these very enactments received the validation of the same courts and in these validations the courts frankly reversed their former rulings. Today, throughout this land, the Tenement House Codes are recognized as not merely permissible but as being vitally necessary for the public welfare.

In the wake of investigation which was being carried on by Sanitarians, Engineers, and the Medical Profession, it became evident that unless buildings were denied the right to occupy more than a portion of their respective lots, light and sunshine and natural benefits would be thwarted and the health and safety of the community would, to that extent, be injured and reduced. To meet

this situation, Building Codes were authorized by every state and today there is no hamlet so small or so poor as not to have its thorough and exacting Building Code. These codes do not merely prescribe the kind of plumbing, the cubicle contents of sleeping rooms, the ventilation and window lighting of the rooms, but they distinctly regulate the limit and percentage of a lot which may be occupied by the building thereon.

Property owners resented the idea of being told just what plumbing they must install, what light and ventilation a sleeping room must have and the countless things which were required in construction, and they doubly resented the idea of being told how much of their land they could employ in their building, for they pointed to the State and Federal Constitutions as proof of their right to build and to use so much of their land as they themselves might choose to do. An assailment of a Building Code today would be rather an anomaly, for the Federal as well as the courts of last resort of every state have pronounced these codes to be legal and within the Police Power. At the time when these codes were being assailed, the very same arguments were offered as were proposed by counsel for the Complainant in the Trial Court in the case at bar, for then as now the property owners complained that their Constitutional Rights were being "nibbled away."

Though it was recognized that the ostracism of "Common Law" and "Statutory" nuisances were wholesome steps and though the Tenement House Code and Building Codes proved helpful to the public welfare, yet it was soon recognized that a new menace of the public safety was darkening the horizon by reason of the construction of very high buildings, which added their congestion to the streets which darkened the thoroughfares and which shut out the light from adjoining and nearby buildings. And so the

Police Power—always equal to the occasion of protecting the public welfare against new conditions as they arise—was once more invoked in the way of enactments which limited the *height* of buildings and which regulated them for the public safety. The Supreme Court of the United States as well as the final courts of state after state refused to be guided by the protests of the property owners who complained of the "nibbling away" of their constitutional rights and who loudly protested against these unwarranted intrusions, for these "height ordinances" are now recognized as legislation necessary to protect the public safety, health and welfare.

As congestion increased and as the complexities of city life multiplied, it became apparent that the danger of fire grew greater and greater and that each new building added its quota of danger because it presented one more unit which might take fire and spread its flames. And so the "*Fire Zone* Laws" were adopted by municipalities throughout the entire country. Many complained because the zone found their property just within and at the extreme edge of the "Fire Limit," whereas the property next thereto or just outside of the "Fire Limit"—on the opposite side of the street—was not subjected to the necessity of abiding by the Fire Zone Ordinance and so those within the limits were required to spend very substantial sums in order to comply with the Fire Zone Ordinance whereas those just outside of the zone were freed from this necessity and that gave a very substantial advantage to those just outside of the zone as compared with those just inside thereof, for the rentals and the income were alike, while the construction cost was much greater within than without the Fire Zone.

Who today would even think of assailing a Fire Zone Ordinance? And yet it is but a comparatively few years

since these very enactments were denounced and contended against by owners of property.

Each one of these and many similar enactments were occasioned by new and unfolding conditions and were necessitated by reason of greater complexity in Civic life, a greater realization of the need to protect the public health, the vitality of the nation, the safety of its people and the welfare of its children as well as the conservation of its property. None of these steps would have been necessary or appropriate in the early or colonial days but they did become necessary and they grew to be appropriate by reason of the increasing population, the manifest congestion, the intensiveness of American life and the new ills which sprang from these new conditions. The Police Power—always equal to new conditions as they arise—was necessarly invoked in order to protect the public welfare against these newly arisen conditions. In just this way it has for some years been found that though nuisances are ostracized, though Fire Zone Ordinances tend to lessen the dangers of conflagration, though building codes regulate the construction of building, though the same building codes regulate the portion of the lot which may be used, and though height ordinances regulate the height of structures, yet none of these alone nor all collectively are adequate to safeguard a real public welfare against the modern congestion, civic conditions, intensiveness of modern life, the tendency toward the annihilation of the American home, the congestion in streets, the terrible congestion in street cars, the resulting increasing communication of sickness, the blighting of territory, the destruction of property values, the increased fire hazards and the appalling increase of accidents with its resulting loss of life and limb.

Just as each one of these preceding steps were necessitated by the insufficiency of what had theretofore been enacted, so it is now recognized that unless the *Use* of districts can be designated, the benefits of preceding legislation will be defeated and will prove to be of comparatively little value in meeting the newest condition of American life. Unless the Police Power is elastic enough to meet these most recently created conditions, the people will need to be content to stand by and find themselves denied the right to take the *best* steps toward the prevention of communicable diseases, will be thwarted in their effort to sanely and in a broad-policy way relieve street congestion, to lessen fire hazards, to reduce street car over-crowding, to forestall blighted territories, to adequately protect public health and safety.

It may be urged that the present enactments and codes are sufficient to meet the present conditions, but that was the very argument which was offered in opposition to each of the exercises of the Police Power. Just as the isolation of the powder mill was not sufficient to meet the needs at the time when the Fire Zone Ordinances were enacted, so it is equally true that the building codes and the height regulations are not sufficient to meet the present-day situation. Today there is required a much *broader* line of procedure, a much *wider* course of action and a more far reaching plan if the welfare of the American people is to be safe-guarded, and this broad, wide and far reaching plan finds—not a panacea—but its best expression and its wisest utilization in regulating the Use for which territories and districts may be employed.

The colleges of the Country, the municipal authorities, the medical profession, the engineering bodies, the sanitary experts, the traffic authorities, the street car officials, the police departments, the Commerce Department of

the Federal government, the banks, the great money lending institutions, the taxation officials, the street cleaning departments, the fire insurance companies, the Civic organizations, the institutions for the protection of children, the Accident companies, and the fire departments have added their statements to the effect that the modern conditions require and necessitate this kind of exercise of the Police Power because the regulations heretofore enacted are unequal to the conditions of today. It is not surprising to find some who refuse to accept and who resist these far sighted and wisely planned exercises of the Police Power, for there has always been opposition to every exercise of the Police Power, and yet those who are now opposing this plan would not even think of resisting these enactments which but a few years ago were equally stoutly opposed and objected to.

The Zoning ordinances are but a composite of the Common Law and Statutory Nuisance Regulations, of the Tenement House and Building Codes, of the spirit of the Fire Zone provisions, of the Height Regulations, together with a districting reasonably applied in order to protect the public welfare, safety and health. None of these regulatory measures is claimed to cure all public ills, but each one does tend to lessen the public loss and injury, and so these Zoning Ordinances, being the most carefully wrought plan and the most comprehensive expression, are closely allied with and plainly tend to reasonably conserve and protect the public welfare, safety and health.

By August 1925, forty-one of the states had permitted their respective municipalities to adopt Zoning Ordinances, because each state has seen the benefits from and the very need and necessity of such a program in order to meet present conditions. Almost every city having a population of 200,000 or more, throughout the entire

Country, has availed itself of these Zoning Ordinances because the wisdom and the *need* thereof have been apparent. Even some of the small hamlets and indeed approximately 400 municipalities have enacted Zoning Ordinances which in most instances—for all intents and purposes—are identical with the one at bar. By August of 1925, over *twenty-six million* people were living within zoned territories within the United States.

The Trial Court has said: "It cannot be said that the Supreme Court of the United States has decided definitely or finally the exact questions here involved. The problem, therefore, is to determine in the light of the principles of law announced and the decisions made upon analogous facts, just what will be the ultimate decision of that Court when a case like this goes to it."

Many states, hundreds of municipalities and several millions of the people are eagerly looking forward with the hope and trust that this Court may find that there is such a relationship between these ordinances on the one hand and the public health, safety and welfare on the other hand, as to warrant this exercise of the Police Power in order to bring about a Greater Public Welfare.

Respectfully submitted,

James Metzenbaum,
Hickox Bldg., Cleveland, Ohio,
Attorney for the Village of Euclid and the Inspector of Building.

December 1925.

AUGUST 15th, 1925.

DEPARTMENT OF COMMERCE
WASHINGTON

26,000,000 People Live in Zoned Cities, Towns and Villages

There has been an increase of more than 130 per cent in the number of people living in zoned cities and towns in the United States during the past four years. By the first of July of this year more than 26,000,000 people were living in 366 zoned municipalities as against the less than 11,000,000 people in 48 cities and towns in September 1921. The number of zoned municipalities thus increased more than seven times during the four year period. The above statistics have been compiled by the Division of Building and Housing of the Department of Commerce.

Twenty-seven of the 33 largest cities in the United States, having populations of over 200,000 inhabitants, have now adopted zoning ordinances, the latest being Denver. The advantages afforded by zoning ordinances have resulted in the rapid spread of the zoning movement, shown by a comparison of the number of zoned municipalities at different dates. The 48 cities and towns zoned in September 1921 were increased to 159 municipalities on January 1, 1923, while on January 1, 1925, there were 320 municipalities zoned.

During the first six months of this year (1925) zoning legislation was enacted by Arizona, Idaho, Maine, New Hampshire and Utah which heretofore had been without zoning laws. Four of these five states used the Department of Commerce "Standard Act" wholly or in large part in drafting their laws. In addition a number of other states made use of the "Standard Act" in legislation supplementing and broadening the application of their existing zoning laws.

MARCH 12th, 1925

DEPARTMENT OF COMMERCE
WASHINGTON

Twenty-four Million Citizens Benefit by Zoning

Headed by the cities of New York, Chicago, Boston, Baltimore, Pittsburgh and Los Angeles, a total of 320 municipalities throughout the United States, with a total population of more than 24,000,000, had zoning ordinances in effect on January 1, 1925, according to information obtained by the Division of Building and Housing of the Department of Commerce. The municipalities range in population from the city of New York with its millions of inhabitants down to the smallest villages.

In adopting zoning ordinances, those cities, towns and villages have sought to protect home owners, and other land owners, in the reasonable use of their property, according to Dr. John M. Gries, Chief of the Division of Building and Housing. Zoning seeks so to regulate the use to which buildings may be put, the area of the lot which they may cover, and their height in different sections of the city, that the land in each district may be used for the purposes to which it is best suited. A neighborhood of small houses, for example, is secured against having a noisy factory site in its midst, with losses not only in peace and quiet, but in property values. The factory owner, on the other hand, is apt to have a better choice of desirable level plant sites with good transportation facilities, and provision is made in properly drawn ordinances for the orderly expansion of the central business district.

Sixty-two municipalities zoned during 1924. Of this number 28 have a population of less than 10,000 inhabi-

tants; 21 have more than 10,000 and less than 50,000 inhabitants; and 13 have more than 50,000 inhabitants.

Of the total number of zoned municipalities 199 have zoned comprehensively, regulating the use, height and area of buildings, while 121 do not go quite so far, many regulating only the use of buildings and some few regulating the use and area or the use and height of buildings.

Forty-four out of the sixty-eight largest cities in the United States, with a population of more than one hundred thousand, have zoning ordinances in effect. Of the combined population of all the cities having over 25,000 inhabitants, sixty-two per cent are receiving the benefits of zoning.

From Address by Herbert Hoover Before the National Association of Real Estate Boards, Chicago, Ill.

A disturbing fact is that the tentative figures from the forthcoming census indicate that the total number of homes owned by the occupiers has steadily decreased, and a total of nearly 60 per cent of our population are living as tenants, a larger ratio than many other countries. If we are to build up the stability and the happiness of our people, this is just the reverse of what should happen. Nothing is worse than an increased tenantry and landlordism in the country.

The municipalities through the enactment of wise zoning laws should co-operate.

This country of ours is still in the making. Shall we look forward as far-sighted empire builders to the conditions which will confront our children in another 20 or 30 years, or shall we as short-sighted, greedy opportunists exploit the present without regard to future consequences?

FILED
FEB 14 1936
WM. R. STANSBURY
CLERK

In the Supreme Court of the United States

October Term, 1935.

Number [redacted] 31

THE VILLAGE OF EUCLID AND HARRY W. BUSH,—
INSPECTOR OF BUILDING,

Appellants,

vs.

THE AMBLER REALTY COMPANY,

Appellee.

REPLY BRIEF OF THE APPELLANTS.

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In the Supreme Court of the United States

October Term, 1925.
Number 665.

The Village of Euclid and Harry W. Stein — Inspector of Building,
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The brief of The Ambler Realty Company having been filed so few days before the hearing, made it quite impossible to file a Reply brief prior to the argument, and so, application having been made for leave to file a Reply brief and this application having been granted, the Appellants invite the attention of the Court to the following subjects which were stressed in the Ambler brief as well as in the oral presentation of the Ambler cause before the Court.

An earnest effort will be made not to repeat what has been set forth in the Affirmative brief of the Village.

The Ambler position was altered in its oral argument.

First: In the trial court the Village understood the Ambler position to be principally founded upon the theory that Zoning and Districting Ordinances are *basically* unconstitutional and although the Bill of Complaint and the oral argument of The Ambler Company in the trial Court did make reference to the claimed damage to the Ambler property, yet the outstanding feature was the assailment of

the ordinance upon the fundamental question of constitutionality. Likewise, the opening paragraph of the Ambler brief speaks of the basic question as the important and prominent one to be decided.

Though we have no stenographic record of the oral argument before the Supreme Court, it prominently stands out in our recollection that counsel for The Ambler Company, in the very opening sentences, asserted that the Complainant was not so much insisting upon the fundamental principle of unconstitutionality of Zoning and Districting ordinances, but was primarily relying upon the unconstitutionality of this ordinance in respect to its application to the particular parcel belonging to the Complainant. This apparent reversal of the importance of the two questions, makes it important that the question of damage be definitely determined and for that purpose we beg the indulgence of the Court.

Is the Ambler brief Right or WRONG?

SECOND: In the recent Ambler brief and oral argument, emphasis was placed upon the fact that it claimed damage resulted to it from the ordinance. In our affirmative brief beginning at the lower portion of page 16 and concluding with page 32—with an intention of complete fairness to the situation and honesty toward The Ambler Company—the Village attempted to show that there not only was no damage to the Complainant's property but that the ordinance actually *enhanced* the value thereof. In aiding the Court to follow this testimony and with the purpose of not trying to take mere unjustifiable or misleading "snatches" from the Record so as to thereby create false impressions, we purposely referred to the testimony of *all* of the witnesses and gave as much if not more prominence to the testimony of the Ambler witnesses than to that of the witnesses for the defense.

The Ambler brief and its OWN citations do NOT agree.

(2) At several places and particularly between Pages 16 and 32 of the Affirmative brief, the Village submitted that (except by way of injuring the public safety and welfare by bringing tracks and factories up to the Euclid Avenue line) the Complainant would be unable to show that the testimony proved damage under the facts as they *actually exist* under this ordinance, and so the Village awaited that portion of the expected Ambler brief which would cite testimony that established damage; and now that the Ambler brief has been filed, the Village heartily re-affirms that though the Ambler brief *alleges* damage, yet the very references to the testimony, contained in the Ambler brief, show precisely the contrary under the facts as they exist by virtue of this Zoning ordinance, as will be presently found.

(3) Before pointing out the difference between the *assertions* in the Bill of Complaint and in the Ambler Brief on the one hand, and the *actual testimony* on the other hand, we feel it necessary to invite the attention of the Court to the fact that this case was not argued upon demurrer in the trial court nor was any oral argument offered after the testimony was completed. As stated in the opening paragraph of the Trial Court (Page 52 of the Record): "This case is obviously destined to go higher. On appeal in equity cases, the reviewing court weighs the evidence and when taken in deposition form it can do so as well as the trial court; hence it is unnecessary to make special findings of fact." The oral argument in the Trial Court was on Friday, December 21st, 1923. Reference to the dates printed in the Record at the beginning of each deposition will show that at the time of the oral argument, neither Ambler (page 135 of Record), Witzel (page 147), Zimmerman (page 165), Greenlund (page 179) nor Laronge (page 196—December 29th) had then testified. Be-

cause the so-called basic "Constitutional Question" was the big point involved, the question of damage was then regarded as but comparatively inconspicuous. But now that the Record is completed and the Village has found the trial court asserting that "none of the important or controlling facts are in dispute, with the single exception of the extent of that damage," and now that the Village finds that in its oral argument before the Supreme Court, the Ambler company takes the position that damage was both proved and conceded, and now that the Village has witnessed the Complainant's alteration of its principal position from that of basic unconstitutionality to that of unreasonableness toward and damage to the Complainant's particular piece of land, the Village feels that it doubly owes the duty to this Court to point out the difference between the *assertions* in the Ambler brief and the *testimony* which the Ambler brief cites as supporting its own assertions. The succeeding parts of this Reply brief ought to make it clear whether the Ambler brief is correct or wrong:

(4) Under the title of "EVIDENCE OF VALUE AND DAMAGE" at the top of page 8 of the Ambler brief, and proceeding on to page 13 thereof, the Complainant refers to the proof upon this score. We wish to trace these pages step by step and compare the text of the brief with the actual testimony referred to therein.

The Ambler brief OMITS the Pivotal words "WHOLE" and "IF."

(a) The first four lines on page 8 bring us to one of the several outstanding weaknesses in the Complainant's position, for their principal witness did testify at the bottom of page 72 of the Record as well as toward the lower portion of page 85 that the Ambler Parcel would be worth less under the ordinance than it would be without the

ordinance, *but* that difference was predicated and founded and built upon the *supposition* that the ordinance designated the *whole* of the sixty-eight acres for residence purposes only, which supposition this Court now understands as being opposite to the facts as created by the ordinance, for the ordinance itself does not designate more than approximately 38% of the sixty-eight acres for residence purposes alone. On the contrary, the ordinance properly leaves all of the available land near to the railroad, free and open for industrial and manufacturing uses, and 130 feet more for industrial accessory uses. *If*—as supposed and premised by the witness Kunkle—the ordinance had forbidden industry and manufacturing to locate along the railroad track and *if* the ordinance had permitted nothing but residences to be constructed along and adjacent to the railroad track, then the supposed premise upon which this witness based his testimony would have been correct and there might have been a lessening of the value, for the use of the land next and adjacent to the track might have robbed that portion of the land of its intended purpose because it would be quite possible that less might be gotten for residence use next and adjacent to the track than for manufacturing purposes, and indeed most people would not want to reside so close to the track. All of this was based upon a supposition directly in conflict with the situation created by the ordinance, because all of the land next to and a wide area of approximately 1000 feet adjacent thereto is open to industrialism and accessory uses, so that the whole of the sixty-eight acres is by no means limited to residence purposes alone. Nor does it by any means follow that more could be gotten from the districted portion than if it were undistricted, for (as hereinafter shown) testimony of *very great* weight was to the contrary. But even without such defense testimony showing greater and earlier income from this districted portion *as* dis-

tricted, it is the duty of the complainant to have furnished *direct* proof of a lessening of value under the facts as actually exist under the ordinance, and it is not permitted to complainant to ask this Court to *presume* that the witness *might* have testified to a loss under the facts as they really do exist under the ordinance. Indeed, such a presumption would contradict not only the weighty testimony of the majority of the witnesses, but would clash with the testimony of this same witness who (toward the lower portion of page 92 of the Record; again at the bottom-most line of 92 and at the middle of 93) testified that: "The *natural* and *logical* way for the development of that property immediately north of Euclid avenue (which is the districted strip in question) is by allotment for workingmen's homes." It is apparent that the testimony here cited by the Ambler brief does not support the assertion of the brief.

The other reference cited in the fourth line of page 8 of the Ambler brief, to wit: page 85 of the Record, similarly *fails* to substantiate the assertion in support of which it is cited for it plainly shows that this testimony of their principal witness was based upon the supposition of the whole sixty-eight acres right down to the railroad track being designated for residence purposes alone, for this witness stated:

> "Taking the Ambler Tract of sixty-eight acres as described in the Petition, if that acreage as a *whole* were restricted to residence purposes, I would say that its market value would be less than one-third of what it would be for industrial use."

The brief of the Ambler company in the first and second lines of page 8 uses the words "as a whole," and rightly this brief should have repeated these same words after the word "restricted" in the third line of page 8, so that

the brief should then have read: "If restricted *as a whole* to residence use, one-third of such value." At the lower portion of page 21 of the Village affirmative brief as well as upon pages 22 and the upper portion of 23 thereof, this fallacious supposition was pointed out by the Village.

(5) The Village never anticipated that the trial court might have misunderstood the fallacy of this supposition as distinguished from the actual facts, so no effort was made in the trial court to point out this or many other reasons which disproved damage and which really established an enhanced value; but now that these assertions relatively form the principal basis of the complainant's position and now that the brief of the complainant contains assertions which the defendants honestly believe are not supported by their citations, the defendants feel that they would be remiss in their duty toward this Court if they did not offer this aid which the Court has the right to expect of counsel. Not for any mere purpose of winning, but as a solemn duty because of the trust reposed in us, we invite the further attention of this Court to the succeeding pages hereof.

Kunkle makes TWO MILLION for Ambler, in One day.

(b) Before leaving the subject of damage as referred to in the Ambler brief, it is to be noted that the same principal witness—Kunkle—when he appeared on December 18th, 1923, gave the unrestricted value of this property as but $9000; whereas when he appeared the next day —December 19th—by a specious method of calculation he worked up the same piece of property to a valuation of $44,000 per acre in the last paragraph of page 85—a difference of $35,000 per acre, or a total difference of $2,380,000.00 for the 68 acres, in one short day. The sophistry of Kunkle's position whereby he reached this figure

and the plain injury therefrom to the public, was set forth in the upper paragraph of page 19 of our affirmative brief.

(c) It is true that the complainant's brief pretends to meet the invitation which was extended in our affirmative brief, but the citations to the Record as set forth in the Ambler brief itself do *not,* we submit, justify the assertions contained in their brief. Under other circumstances the omission of an "if," or the failure to repeat the word "whole" may not be of great importance, but the Village feels compelled, under the present circumstances, to characterize these omissions in the Ambler brief as *tremendous trifles.*

(d) Before going forward we pause to say that we know that the Court will not be unmindful of the fact that, though the Euclid avenue frontage and approximately 620 feet therefrom has been districted against factories, this is for the purpose of preventing a condition along Euclid avenue which would be subversive of the public welfare, safety and health; for it was intended to prevent the bringing of railroad switches and engines up to Euclid avenue, which is the very right that the complainant strove to establish by each of its witnesses; for Kunkle, Witzel and Ambler frankly based their testimony upon the theory of "having tracks and factories right up to Euclid avenue" in order to create their values, and upon the right to be "unrestricted in *every* way." (Please see pages 18 and the middle of page 19 of Village affirmative brief where this *important* phase is plainly set forth.) That point is to be quite distinguished from the question as to damage; for it is presumed that the Police Power is admittedly sufficient to prevent a use which would or might be so plainly detrimental to the community and its health and welfare.

Plaintiff witness-Witzel's testimony Not Correctly pictured in Ambler brief.

(6) Proceeding next, to page 9 of the Ambler brief we find the testimony of their other witness—Witzel—described as showing a valuation of $3000 per acre, and in support thereof the Ambler brief cites page 154 of the Record. It is quite inconceivable that the brief should ascribe to him this valuation when it is so apparent that Mr. Witzel had, prior to page 154, testified to the effect that the land nearest to the track was the most valuable, and yet after the Ambler brief ascribed to Mr. Witzel a valuation of $8500 to $10,000 per acre, this same brief quotes this same witness as placing a valuation of but $3000 per acre on the 1100 feet nearest to the track. The brief of the Ambler Company is correct in quoting Mr. Witzel at page 149 of the Record as to a valuation of $8500 to $10,000 for the whole parcel undistricted, but we submit that since Mr. Witzel had testified (what is perfectly apparent even without his testimony) that the land next and near to the track would be worth certainly as much or more than the land nearer to Euclid avenue, the brief does not do justice when it attempts to picture Mr. Witzel's testimony as showing that the 1100 feet nearest to the railroad track would be worth only $3000.

We have just referred to page 210 of the typewritten transcript of Mr. Witzel's complete testimony as it was taken at the time his deposition was given. There, beginning at the first line of page 210, the following appears, except that we have italicized several words:

"Q. The red piece, alone, 1100 feet in width?

A. I should say that that property ought to be worth *ten* thousand dollars an acre.

Q. *Ten* thousand dollars an acre, just as it stands, would you say?

A. Yes, the red property."

The Ambler company has a carbon copy of this complete testimony so that we could not possibly misquote and indeed this is so apparent that the attempted capitalizing of this is quite inexplicable. The narrative Record itself shows that Mr. Witzel was ascribing a value of at least $10,000 and perhaps even more to the 1100 feet near to the railroad track, and for both of these reasons the Village finds itself rather astonished to notice the brief of the Ambler company ascribing to this witness a valuation of but $3000 per acre nearest to the track, under the ordinance. In the same way their brief refers to page 151 of the Record, but it fails to refer to the upper four lines of page 161 wherein witness Witzel conceded that in four years "not a single factory had been built in the entire Village of Euclid, except one, since 1920," according to his best recollection.

Undoubtedly this plaintiff witness was a disciple of Talleyrand; firmly believing that the purpose of words is to conceal one's thoughts; for his testimony is so full of circumlocution and so "hop-skip" that one has difficulty at times in determining what this witness really meant; but the least that can be said is that he did not clearly or adequately prove—as is incumbent upon the complainant to do—any damage to the complainant's land by virtue of the ordinance.

Why did the Ambler brief cite the Following?

(7) Next taking up the question of witness Laronge, whose testimony is treated at the lower portion of page 9 and the upper half of page 10 of the complainant's brief, it is proper to have quoted Laronge as fixing a valuation of $8,000 per acre for the complainant's land if undistricted, but we respectfully submit that the attempt to picture this witness as giving but a $2,000 value per acre

under the ordinance and the attempted support thereof by quoting page 202 of the Record, is in striking *contrast* with the real and actual testimony as given by this man, who is conceded to be the leading figure in Cleveland's real estate affairs. The Ambler brief pretends to picture Laronge as having testified to a valuation of but $2000, whereas an inspection of the 6th to the 12th lines of page 202 shows the following, except that we have italicized certain words:

> "*Eliminating* the Euclid Avenue *frontage entirely,* and taking the land north of that between Euclid Avenue and the *Nickel Plate track,* I would say that to a man engaged in the business of buying tracts of land for allotting and selling for residence purposes, considering the present market, assuming that streets would be cut in there but *no Euclid Avenue frontage,* again depending upon the lay of the tract, it would be worth about $2000 an acre."

From this quotation—which is the very portion referred to by the complainant's brief—it is apparent that the witness was required by the Ambler attorney, to testify on the *supposition* (1) that the complainant's parcel would be used and was restricted for residences alone *right up to* "the Nickel Plate track" itself, which is a supposition at variance with the facts under the ordinance; and it is further apparent (2) that the witness was required by their own question to "eliminate the Euclid Avenue frontage entirely" and was including "no Euclid Avenue frontage." Under these circumstances we do not believe that the Ambler brief is warranted in making the assertion as it does at the lower portion of page 9, to the effect that this witness gave a valuation of but $2,000 as compared with the unrestricted valuation of $8,000.

We respectfully submit that this assertion in the Ambler brief and this attempted substantiation by citing page

202 is shown to be even more unwarranted if one will but read this same witness's testimony just below the middle of page 197 where he testified that the part districted under the ordinance for residence would really bring *more* per acre than if that portion were used for industrial purposes, for he testified that the industrial purpose use would give a value of $8,000 per acre where as if this 620 foot strip near to Euclid Avenue were used for residence lots and even without the improvements thereon being paid for, it "*would run a little better than $11,000* an acre, figuring six lots to the acre." So that the Ambler brief not only mispictured page 202 but it also entirely overlooked page 197. The complainant's brief further blinds itself to the following two sentences which boldly stand forth on page 199 of this witness's testimony and which read as follows:

> "There is *no* demand for that frontage (Euclid Avenue) for retail business property if it was unrestricted, and it is difficult to say what its value would be for that purpose. If there were a demand for stores in there, I would say it would be worth anywhere from $75 to $100 a foot for stores. I do *not* mean to say that the mere lifting of these restrictions would make it so that you could go right out and get $100 a foot for it. I *don't* think there is a market right there for business property now."

> "As to the purpose for which that property is most available at the present time, in my judgment, all this vacant property between Euclid Avenue and the Nickel Plate track, throughout the length of the Village, if I understand your question, I would say that all of the property referred to could be disposed of *more* readily as residence sites than anything else, I mean at the present time, for the reason that the demand for residence property in this section exceeds that for manufacturing sites, chiefly because of transportation."

In addition to these quoted portions, the Ambler brief fails to refer to the *further* increased value which this witness testified as possible to come from the diminishing of the amount of land available for industrial purposes as shown in the concluding paragraph of page 198 of the Record.

Is it the Ambler BRIEF or the TESTIMONY which must show damage?

(8) The Ambler brief next treats of the defendant's witness Greenlund, and though the brief must be applauded for adroitness, it can hardly be credited with a fair picturing. The Court will but need to read the quotation at the lower portion of page 28 and pages 29 and 30 of the Village affirmative brief (and we beg the Court to do this) to see that this witness painstakingly proved, step by step, that the ordinance very materially and very substantially *increased* and enhanced the value of the complainant's land. It is needless to show the variance between the Ambler brief at the bottom of page 10 and the actual testimony of this witness, further than to read the above referred to quotation (pages 28, 29 and 30 of Village brief) and the testimony of this witness at the upper half of page 182 of the Record, except to invite the attention of the Court to the two additional facts: that the pretended quotations from pages 194 and 187 of the Record, as shown at the upper portion of page 11 of the Ambler brief are quotations which, to say the least, are not faithful to the testimony of this witness; for this witness emphatically declared at the upper portion of page 187 that:

> "Euclid Avenue along there (in Euclid Village) is likely to work out as a commercial street *eventually* but not *now.*"

And again, at page 195 this witness said:

> "I am contending that this is allotment property today and ready and ripe for development. It is *not* ready and ripe for development as factory property, even in small parcels."

The little extract which is quoted in the complainant's brief as coming from page 194 of the Record is not fair to the testimony, for it is but a sentence taken out of a solid paragraph and it really does violence to the plain intent and testimony of this witness who was the former Lieutenant-Governor of Ohio and whose testimony throughout exhibits intimate knowledge of the particular situation. This entire paragraph, with italics supplied, reads as follows:

> "I have said that, as Euclid Village develops, Euclid Avenue would *eventually* be a business street. Just how soon that would come we can only guess; it might come faster than I said, and it might come slower. I think it is fair to assume that business and manufacturing will be located north of Euclid Avenue and dominate that section. The residence section will *not* be entirely south of Euclid and north of the New York Central tracks. I *don't* believe that the business section will be very much deeper than 150 or 160 feet along Euclid Avenue. Assuming that that is true, I *don't at all* also assume that if natural developments were permitted, the territory north of that 150-foot line north of Euclid Avenue would eventually develop for manufacturing or business purposes. *There would be quite a large strip of residences in between,* and that is true of every business street."

The forcible extraction by the complainant, of one sentence out of a paragraph can best be likened to the unbeliever who invited a minister to read the top line of a page of the Bible, where it was written that: "There is no God." Thereupon the minister thumbed back to the bottom lines of the previous page where he disclosed the preceding words: "Sinful is he who says that"

Can the Ambler BRIEF support itself by Ambler's OWN TESTIMONY?

(9) The Ambler brief next gave its attention—on page 11 thereof—to the testimony of Mr. Ambler himself and here we find exactly the same failure to insert the word "whole" as in the Kunkle situation. Mr. Ambler did say at page 135 of the Record that the value of the sixty-eight acres would be but $2000.00 per acre, but his testimony clearly shows that this valuation was upon the *assumption* that the whole and the entire sixty-eight acres *right down to the* railroad track were districted for residences alone, which is an assumption contrary to the facts under the ordinance; for the available portion of the land which lies adjacent to the track is open and unrestricted for industrial and manufacturing purposes and is not limited to residence purposes alone, and the next 130 feet is open to use for clerical and office and restaurant and other purposes accessory to factory purposes.

We fully invited attention to this situation and to this fallacious assumption, in the last paragraph of page 22 as well as on page 23 of the Village affirmative brief, and yet the Ambler brief attempts to cite this just as though this assumption had not been made the basis of that testimony.

(10) Concluding with the testimony of witness Stein on page 12 of the Ambler brief we beg to cite the Court to the last paragraph of page 30 of our affirmative brief and to the following excerpt from Mr. Stein's depositions which fairly pictures his entire testimony: "In my judgment, I would say that the Ambler tract is worth *more* for homes than it is for factories, because there is no factory value, no factory demand." And this testimony was founded upon the intimate experience of this witness de-

tailed by him in reference to a great many real estate transactions within the Village of Euclid.

(10b) *The Ambler Brief Skips over This:*

Beside Laronge, Stein and Greenlund's testimony showing no damage under the ordinance, there is the testimony of Whitten which, however, is entirely "neglected" by the Ambler brief. May we ask the Court to read the *increased* valuation set forth by Mr. Whitten on page 119 of the Record, beginning at the middle of that page, for it truly is worthy of being read.

(11) We have not taken the space to deal with the values referred to in the Ambler brief as applicable to other parcels East and separated from the parcel in question, because we think that there is sufficient difficulty for the Court as well as for the parties to keep the figures in mind in so far as they refer to this one particular parcel without bringing in countless other figures in reference to other locations.

For the same reason we have not attempted to delineate the fallacy as to the so-called store values, for these are but mythical, because everyone did and must concede that greater and much earlier returns can be gotten for residence than for store use along the complainant's land as well as along most of the thoroughfare because there is no demand for store use, and indeed this is virtually conceded at the bottom of page 11 of the Ambler company's brief which admits that "only a little more (can be gotten out of the Euclid Avenue frontage) if unrestricted against business, because he (Mr. Ambler) thought that there was little, if any demand for business, along that frontage, except at strategic corners." (And—as shown hereinafter—every one of those corners has been districted for business.)

(11b) We beg to say to the Court that the testimony was being taken all day practically each day and the briefs had to be in the Trial Court before January 1st, and as the last testimony was not completed until December 29th, the Village was necessarily compelled to get out its brief during the night hours and because the "big" and "new" question was the legal and basic one and because this "important" question required as well as warranted most studious and undivided attention and because of the limited time, the Village in its own brief in the Trial Court did not at all treat with the testimony. There having been no oral argument after the testimony was completed, it was therefore quite impossible for the Village *itself* to have given to the Trial Court any aid upon this score. With an earnest and genuine respect for the Trial Court, the Village believes and sincerely feels that the Trial Court misconceived the effect of the testimony, for enhancement and not damage unrelated to the public welfare is the effect thereof.

It is with genuine reluctance that we have asked the Court to again go over this phase of the subject, but because the Ambler company in this Court apparently altered its primary form of attack and made its principal basis that of damage and because the brief of the complainant makes pretense of substantiating its assertions by citations that really do not uphold the brief, we have felt it our duty to this Court, to the ten thousand persons who live in the Village and the countless others throughout the entire country, to aid the Court in having the real and the actual facts brought to its attention.

In doing this our earnest esteem for the Ambler counsel is not one whit diminished; for our affectionate regard, of so long standing, really grows warmer year by year.

(11c) The benefit to the public welfare, safety and health by having the 620 foot "buffer" between the factories and Euclid Avenue, and the fact that the best use of the 620 foot strip would be just as the ordinance provides, were conceded by virtually all of the witnesses for plaintiff as well as defendant, as is fully set forth on pages 17 and 29 and especially page 35 of the Village affirmative brief. And this 620 foot area, as pointed out in our affirmative brief, gives excellent opportunity for future streets parallel to Euclid, so as to relieve the growing congestion and also supply a *third* "back" street for factory trucking.

Such use would not require a zoning ordinance.

(11d) In final, the Village submits that it really would be unnecessary to resort to a zoning ordinance in order to prohibit switches, tracks and factories from coming out to the North line of Euclid Avenue, because such a use would really be so injurious to the public safety, health and welfare as to come within the decision of *Western Foundry vs. Salt Lake City,* 55 Utah, at pages 447, 452 and 455; *In Re Russell,* 158 N. Y. Supplement at page 162; *Hadacheck vs. Los Angeles,* 239 U. S. 394, 395 and 410, and *Manhattan Co. vs. Des Moines,* 193 Iowa 1096. Such a use always can be prohibited for its plainly injurious effect upon the public safety and welfare.

This justifies a contrary decree.

(12) Temperately, but with firm confidence, the Village of Euclid meets the new position of the complainant and submits that since the ordinance must be presumed to be legal, since it is the duty of the complainant to establish damage and loss clearly and convincingly and as being *plainly un*related to the public welfare, and because

the complainant undoubtedly attempted to show its *strongest* testimony and since the assertions of the brief must really be conceded as being *un*supported by the testimony and Record itself, there is here presented just what the Village contended in its affirmative brief, namely: an apparent failure to establish the very first basis for its complaint, that is—a failure to establish damage to the complainant's land upon any proof except upon a use admittedly subversive of the general welfare and injurious to the public safety and health. In brief, the Village —weighing its words—submits that the complainant has failed in its very first requisite of establishing damage through its own testimony or through the witnesses of the defense.

AS to that "LEAFY HILLSIDE."

THIRD: When counsel for the Ambler Company was about to conclude his oral argument before the Supreme Court, he referred to the fact that the ordinance apparently denied the right to establish orphanages along the high side of Euclid Avenue and feelingly referred to the denial of the right to use this "leafy hillside" for the orphaned young.

Counsel for the Village sat in amazement as he heard the Ambler company present a picture which was diametrically opposite to the testimony which the Ambler counsel themselves had brought into the Record. Neither court decorum nor good manners permitted any interruption or correction. If the Court will turn to the bottom of page 171 it will find the testimony of General Zimmerman, mayor of the Village of Euclid. In that testimony, brought out by Ambler's counsel, it is clearly shown that approximately opposite the Ambler parcel there are two such institutions—one being a Home for Children across

the street but a little west of the Ambler parcel and fronting on the South side of Euclid Avenue and being about four acres, and the other being an Orphan Asylum of over 14 acres (marked U 3) fronting on Euclid Avenue across the street from the Ambler parcel but a little to the east thereof, and a still further place of several acres in course of dedication for another Home for Children, somewhat further east (marked U 3) and fronting on the south side of Euclid Avenue.

The Children's Home which is situated opposite and a little to the west of the Ambler parcel does not appear upon the map which was introduced by the Ambler company, but the location of this is indicated in the further testimony appearing at the bottom of page 175 and the top of 176. It is immediately opposite Lamb and Iddings Avenues, 193rd and 195th Streets and next east of Genesee Road. It is a fact, and not to be disputed that these Children's Institutions are located along this very "leafy hillside" and constitute many acres thereon. It is a further fact that the whole of this hillside along Euclid Avenue is used for modest homes, is—month by month—being subdivided for more and more of modest residence allotments and is—according to the testimony of the Ambler witnesses—destined to be used for "workingmen's residences." (The small Zoning maps are not intended to show or be kept up with the new institutions or with many additional allotments which have been dedicated throughout the Village and along the north as well as all along the entire south side of Euclid Avenue so soon as the people saw that the Zoning ordinance would protect this stretch from industrial and track invasion.)

The Ambler company, as is apparent from pages 18, 19 and 20 of our affirmative brief, is contending for the unregulated right to bring factories, switches and tracks

right up to the North sidewalk line of Euclid Avenue, for that Company *seeks to strike down this entire* ordinance so that it may be completely unregulated, and in this way it would be able to establish conditions upon its land as well as all along the entire north side of Euclid Avenue, which would be detrimental to the homes and residences along Euclid Avenue. And in this way they would win the unregulated right, for which they are contending, to bring the rumble of the trains, to cast the soot and smoke, to spread the fumes and noise and gas of these engines and tracks and factories upon the very roofs that shelter these little children and upon the heads of these youngsters who *really are* housed upon the acres of land now dedicated to these homes for children and orphans.

It is to be remembered that in addition to the topography of the hillside making it unusable for business (except at the two low spots where Chardon Road comes down from the hill and meets Euclid Avenue) there is street after street of modest residences leading north from Euclid Avenue all along the territory in question, as is evident from the middle of page 101 and particularly pages 102 and 103 of the Record.

The children going to and from the large nearby school on Chardon Road (marked U 3) and the people going to and from the "center" of the Village would be subjected to the dangers and the ills of switches, spurs and factories if brought out to the north line of Euclid Avenue.

This unmeritorious desire on the part of the complainant was not penitently confessed by the complainant; but instead, the complainant attempted to picture the Village as indifferent, as cruel and unfeelingly aesthetic in barring this "leafy hillside" to orphan asylums and the like. And this was done despite the fact that the testimony as adduced by *themselves*, showed the contrary to be true and

despite the further fact that the desire "to be entirely unregulated" and to free the northerly side of Euclid Avenue must necessarily result in the injury to these defenseless children as well as to the modest homes that now occupy and, in daily increase, must continue to occupy the south side of Euclid Avenue and the entire surrounding territory.

AS to "CHURCHES," "SCHOOLS" and the like.

FOURTH: In the oral argument the Ambler counsel cited as one of the vices of the ordinance the fact that churches, schools and charitable institutions were not permitted in the residence sections but were districted down into the U 3 classification.

This is not the first time laudable purposes have been cited as examples of culpability. Neither presidents nor subordinate officials who are unjustly criticized nor certainly, speechless legislative acts can be constantly broadcasting their explanations and so usually the attackers, at first blush at least, appear in heroic roles. Perhaps a simple and frank explanation will undo the ill-founded claim of the complainant.

Municipalities can not, without being guilty of paternalism, confer with *individuals* as to the advisability of the locations which the individual may select for the home. But the municipality does owe to public and semi-public institutions and can properly extend to such institutions such advice, information and aid as the municipality possesses. Accordingly, many zoning ordinances are purposely drafted so that the school authorities, church officials and trustees of charitable organizations will be required to come before the higher officials or the Appeal Board, for the sole and single purpose of lending to such institutions such aid, or of giving them such information

as may be within the power of the officials of the municipality. Several examples might be cited, among them that of school authorities who optioned a parcel under the mistaken belief that a highly dangerous next door occupation could be abated if the school built there. This probable costly error was corrected in time by the Board because that particular ordinance required a special permit, so that zoning ordinance in reference to schools, churches and other semi-public institutions worked out—just as it was planned—to the advantage and to the welfare of the community, instead of the ordinance having worked an injustice which, upon first blush, might have appeared to have been the purpose of that ordinance.

In one instance a church had optioned a parcel in a zoned municipality and came with its plans and was refused its permit because in that instance that particular zoning ordinance districted churches into a low classification whereas the location optioned by the church was in a higher classificaton. Accordingly the Inspector of Building promptly referred it to the Board who conferred with the church trustees. At this hearing or conference, the Board and the City Planning Commission informed the trustees that of course it would recommend the church establishing wherever it pleased and in whatever district or classification it desired but that the municipality in the construction of its sewage plant and its sewer system had just been instructed by the State health authorities and engineers that the most available location for running its largest pipes would be immediately next to the location optioned by the church and that since this sewage work would require some years before completion throughout the municipality, the parcel adjoining the proposed church site would be constantly "torn up" and would eventually not be as desirable as it then appeared to be. The drainage and topography caused the State engineers to feel

that particular location to be necessary. The trustees were grateful for this information and appreciated the aid and thereupon selected a site within the same residence district but somewhat removed from the original location, and promptly, by unanimous official action, the church found itself welcomed in the U 1 residence district, because the sole purpose of placing the schools, churches and charitable organizations in a low classification in that particular ordinance, was in order that these institutions might be required to come before the Commission for the very purpose of avoiding injury and mis-selection upon their part. Some ordinances are drafted upon the theory that this help could be best extended by compelling these institutions to obtain special permits and other ordinances are based upon the philosophy that by placing these institutions in a low classification they will be compelled to come before the Commission and they will thereby obtain that help to which they are rightly entitled. So that the purpose is not at all to bar them from being located in U 1 or residential districts, but merely so as to assure them of the co-operation which their public and semi-public character entitles them to receive. Perhaps some might think it equally well or better not to follow this method but to district schools, churches and similar institutions into *all* districts. The frank answer is that now since this point has been stressed it is seen that this one provision may be *possible* of being improperly employed and perhaps, somewhere, may have been mis-employed, but is not that possibility equally true of many statutes and ordinances that are admittedly legal and of long standing, recognized as valid? It can but be answered that this provision, in the Village of Euclid, has worked out to the complete satisfaction of every church and institutional applicant and that until this objection was voiced in complainant's brief and argument, no one

has ever even spoken of such objection. Indeed, it was so far from the thoughts and intentions of the commission and the council that it was never thought of. The churches —new and old—have never complained. The point is first raised by this complainant who wants to build no church or school but who seeks to strike down the entire ordinance.

(2) Now, it may be said in answer to this, that the necessary amending of the ordinance for these public institutions may be improperly withheld and that thereby they may be deprived of the right to locate where they desire. The only answer to that is the frank and honest one: that for any official to refuse such action would be so neglectful of the public welfare, so un-American and so violative of the oath and duty of these officials, that such an attitude can hardly be attributed to any official; and beyond all this, the presumption is that officials will do right and not wrong, whereas to presume an unwillingness on the part of the officials to concur in the necessary action, would be to presume that they will do wrong rather than right. Indeed, no less an authority than the United States Supreme Court has written:

> "It is further claimed that this provision is subject to the arbitrary whim of the Railroad and Warehouse Commission. In cases of this kind, however, it will be assumed that the public commission will act fairly and with reason and not arbitrarily." 242 U. S., as quoted in 280 Fed. at 395, *Chicago R. R. Co. vs. R. R. Commission.*

So too, in 242 U. S. page 590, *Merrick vs. Halsey & Co.:*

> "The contentions based on the exemption and provision are a part of that which accused the law of conferring arbitrary discretion upon the Commission. The accusation is formidable in words, but it is the same that has been made many times. We repeat, there is a presumption against wanton action by the commission."

The Facts as to Churches in Euclid Village.

(3) Now that the question has been raised by the complainant, the Village feels the liberty to answer by saying that because of the great growth in residences since the ordinance was enacted, the older churches have proved insufficient and as a result thereof several applications have been made by churches, each to be located in U 1 residential districts in the Village of Euclid and in no instance has there been any delay, but, on the contrary, the recommendation of the Commission has been *unanimous* and prompt and the authority has been voted *unanimously* in *each* instance, for it is of course recognized that an amendment for such purposes is for the general *welfare* of the community.

(4) In addition to all this, the Village points out that this complainant really ought *not be heard* upon this score, for this complainant has never applied for any permission to and does not wish to build any church or school or orphanage, but on the contrary it is calling for the *striking down of the complete ordinance* just as the *court below struck it down completely*—in order that this complainant may have the *un*regulated right to use its land, not for churches or schools or orphan asylums, but for railroad tracks, switches and factories right up to the main thoroughfare, which will bring injury to these very churches, schools and orphan asylums which lie only shortly removed from the land of the complainant and in this way every other piece of land—when the ordinance is stricken down—will likewise be unregulated and free to be used to the detriment of all of the churches, schools, orphanages and residences not only in the Village of Euclid but in the hundreds of zoned cities which house millions of people throughout this country. We believe that under the facts in the case at bar and with no ap-

plication ever having been made for any permit whatsoever, this complainant ought not be permitted to "lamblike" raise this question, for these questions may well be reserved for the time—if it ever comes—when the Village of Euclid really refuses to take such steps as will permit the locating of an orphanage, a church or a school. If the complainant would apply for a school, church or orphanage permit his flight from the Town Hall would doubtless be precipitous for he would quite certainly get what he does not want—prompt action allowing the church or orphanage.

AS to the "LOWLANDS."

FIFTH: In the oral argument great effort was made to impress this Court with a picture which would paint the ordinance as designed for mere aestheticism because the south or hillside of Euclid Avenue was set aside for a U 1 or single residence district alone, whereas other types of construction were—as the complainant said—"depressed into the lowlands" and were denied the benefits of this hillside. This was a new and unanticipated argument, for it would cause the people "in the lowlands" of Euclid to gasp. This argument was intended to picture the hill or south side of Euclid Avenue as meant for the aesthetic rich and purposely set aside for the wealthy, single-residence householder because of its height. One needs but to read the testimony of Mr. Ambler himself just below the middle of page 138 of the Record where he—showing that the south or hillside of Euclid Avenue would be for but modest homes of workingmen—testified:

What Mr. Ambler said.

"The territory south of Euclid Avenue on the north slope of the ridge and southerly therefrom, that class of territory is considered now, so far as its market is concerned, and the uses to which it could be

> put, as home sites for the skilled laborer, a *low* class of residence property, couldn't be the lowest, but it would be the *poor* laboring class."

Indeed, all of the complainant's witnesses constantly "hammered away" upon the theory that this hillside was now and necessarily would continue to be used for a very "low class and modest homes" and that for this very reason it was not important to protect this area against the damaging influence of spurs and switches and factories right up to the north line across the street on Euclid Avenue. This is evident from their other witness, Kunkle, just below the middle of page 94; their witness Witzel at top of 159 of the Record and our Affirmative brief at lower half of page 10. And yet the complainant in its oral argument tried to impress this Court with the exactly *opposite* theory, namely: that the ordinance "depresses the other uses into the lowlands in order to serve the aesthetic purpose of protecting this aristocratic and leafy hillside." If further evidence of this unwarranted picturization were desired, it would be found in the succeeding testimony of Mr. Ambler where, on page 138, he stated.

> "The home sites in the allotments that have been opened up south of Euclid Avenue (that being this very hillside) average about one thousand dollars a lot. That price is recognized as about the *lowest* price available. It is the average price that is being paid by that class of laborer."

It is a fact that the topography of the southerly side of Euclid Avenue (except at the S. E. and S. W. corner of Chardon Road) has and will always make it impossible for business or industrial use and will necessarily keep it for residence purposes—simple residences for modest people who, though characterized by Mr. Ambler as but "skilled labor occupying a low class of residence," are neverthe-

less humans and residents entitled to be protected against the invasion of a use which will be subversive of their welfare and that of the entire south side, as well as harmful to the welfare, health and safety of the whole community.

The Wealthy live far away in the Very Lowest lands.

The fact is and the Record shows at the middle of page 119 and at too many places to permit citation and it is commonly conceded, that the so-called aristocratic and "wealthy" section of the community is located in the very *lowest* part of the Village—that portion along the Lake Shore Boulevard. If the Court will refer to the defendant's "Elevation Map"—Exhibit 3 and to the Engineer's testimony on page 125 of the Record, it will be found that the altitude of Lake Shore Boulevard—along which, especially east of Bliss Road, the aristocratic homes are found—is but 25 feet; whereas St. Clair Street is 40 feet higher, and the north or low side of Euclid Avenue is 81 feet higher, being at an altitude of 106 feet. From this it must be evident that the attempted picturing of the *high* side of Euclid Avenue as having been set aside, because of its height, for residence purposes alone, for mere aesthetic reasons, and the so-called "depressing of other uses into the lowlands," was but an oratorical effort designed to build up the complainant's attempt to stamp this ordinance as being an expression of aestheticism, whereas the ordinance is founded upon and really breathes the welfare, the safety and the health of the community. The *facts* did not warrant complainant's oral assertion.

It is a further fact that much of the territory *throughout* the Village, is districted for U 1 purposes, because these portions are *now so occupied* and because (as set forth on page 167 of the Record) many additional portions

have been allotted with residence *restrictions*, which the ordinance neither did nor could undo; just as in the instance of the allotment, immediately next to the 68 acres in question, which was allotted by the president of the complainant company who restricted this allotment to residence use.

AS TO AMENDMENTS.

SIXTH: (1) Not in its brief but in its oral argument, the complainant attempted to capitalize the fact that though the ordinance required but a majority of the council in order to enact it, it needs a three-fourths vote of the council if the Board reports adversely as to a proposed amendment or if there be a given number of protests lodged against a proposed amendment. In the New York State Act of May 15th, 1917, § 83 it is required that an *unanimous* vote is needed if a given number of protests are filed, and in every other Enabling act and ordinance throughout the entire country, insofar as we have knowledge thereof, there is a provision which requires more than a majority vote in order to amend if there be a given number of protests or, in some ordinances —if there be an unfavorable report by the Board or Commission. This requirement has always been looked upon as an asset and as a *virtue* of zoning ordinances for it gives stability and permanency to the districting and it yet allows sufficient latitude for amendment when the amendment is apparently for the welfare of the entire community. One can almost hear how this complainant would have proclaimed against the ordinance by declaring that upon a mere and bare majority vote—even if there were protests or an adverse report—the council could revise a district and one can almost hear the complainant insisting that such procedure would not be adequate protection for

those who had relied upon the districts as ordained. Now that the Euclid and all other ordinances do properly safeguard and stabilize and give sufficient permanency to the districts, the complainant attempts to capitalize this very virtue as a vice.

It is evident that the Village Council would not have the time or the intimate knowledge which would be possessed by the Commission and Board. When the Commission has carefully investigated and has made full report of its favorable or unfavorable finding, what is more American and what has become more common than for the legislative body—the Council—to be at least partly guided, by such investigation and reports? The legislative power being vested and *retained* by the council, it may—by a three-fourths vote—see fit to disregard even a generous number of protests against a proposed amendment or to overrule and to refuse to be guided by the careful study and investigation of the Commission or it rightly may—by a mere majority vote—concur in the studied result arrived at by the Commission. This is no delegation of legislative authority, for the council must and does retain all legislative power, but where there are a sizable number of protests or where there is an unfavorable report by the investigating body, the ordinance should have the right to establish the number of votes required to concur in an amendment, so long as the amendment is not legislated by the Board or the Commission but is enacted and voted by the council itself.

The original New York Enabling Act did not provide for a Board of Appeals, but when it was found that this administrative division was necessary and required in order to make the ordinance workable and in order to properly function and carry on the administrative work, the Enabling Act of New York State was amended so as to

create the Board of Appeals and this Board has been held valid and legal not only in the State of New York but in many other decisions among which some are mentioned on pages 91 to 94 of the Village affirmative brief.

And when the Supreme Court of Ohio held the Cincinnati Districting and Zoning Ordinance to be legal, it apparently found no fault with the so-called Amendment Clause which, under the Cincinnati Ordinance, requires a three-fourths vote in the event of a protest.

This State Enabling Act requires this three-fourths vote.

(2) Indeed, under Section 4366-11, which is the Ohio State Enabling Act and which appears at the bottom of pages 40 and 41 of the Ambler brief, the Legislature itself has provided that a three-fourths vote be required if there be an adverse report. The amendment provisions of the ordinance are found in Section 25 on page 25 of the Record.

The so-called "model State Enabling Act" issued by the Department of Commerce (copies of which are being sent to this Court) at Section 5 on pages 7 and 8 thereof and in foot notes 30 to 37, uses the same procedure which requires a three-fourths vote for an amendment.

A search of the various State Enabling Acts and of the various municipal ordinances discloses the same kind of a provision requiring more than a majority vote for an amendment if there be a protest or an adverse report.

Congress also required this.

(3) In Section 4 of the Act of Congress of March 1, 1920, (66th Cong.—No. 153—H. R. 6863) there are the similar requirements but these provide for a *unanimous* vote for amendments.

Perhaps in Ohio this provision is a nullity, but that will Not aid complainant.

(4) Just as we, throughout, have tried to fairly treat the position as well as the testimony of the complainant, so in adherence to that method and in fairness to this Court we invite attention to the fact that by reason of Article XVII, Section 3 of the Ohio Constitution, known as the so-called "Home Rule" provision, and because of the decision referred to on page 124 of our affirmative brief—108 O. S. 245—it may be argued by the complainant that since municipalities in Ohio draw their Police Power *directly* from the Constitution, there is no need for a delegation of these powers by the Legislature to the municipalities and that therefore the Ohio State Enabling Act is not needed and that as a result thereof the State can confer no greater right nor can it diminish the right of a municipality to exercise its Police Powers and that therefore the delegation by the State to the municipalities on *condition* that the municipalities require this three-fourths vote is a mere nullity. It is doubtless true that if this delegation is *not* a mere nullity, then the State *could* legally delegate the power *subject* to the three-fourths "amendment" requirement, even though it be the admitted rule that one council itself could not impose this requirement upon a succeeding council.

Even if correct, this would NOT help Plaintiff.

Accordingly it may be argued by the complainant that the three-fourths limitation regarding amendments as set forth in the Ohio Enabling Act is a limitation which the municipalities do not need to obey for, as above stated, it may be urged that municipalities have this Police Power from the Constitution without any need of delegation by the State Legislature. If this reasoning be logical and

correct then, as we understand the situation, the complainant would not be in any better position, for even if the so-called "three-fourths amendment requirement" is a nullity in Ohio, this would simply mean that the ordinance *can* be amended by but a mere *majority* vote, and if that be true, then certainly the Appellee cannot complain, for if an amendment can be made by a mere majority vote, then the very basis of that complaint falls. This we submit, is not sophistry but is intended as frank and sound reasoning.

But complainant ought not be heard on this score.

(5) Beyond all this, as stated in other parts of this brief, the complainant making an "omnibus" assailment of this ordinance and the complainant never having sought any amendment, never having submitted any plans or applied for any permit and never having applied to the Board of Appeals, the Village feels that it is not merely justified, but, in fairness to the Court, obliged to submit that these objections are not open to the complainant in this suit but that these questions may be properly raised only when and only if a case arises which actually presents to the Court a refusal to amend after such complainant has made an effort to obtain an amendment.

Not because the Village fears to meet any of the objections urged by the Complainant, the Village nevertheless does submit that in the situation presented by the case at bar, all of the objections other than that of basic unconstitutionality and other than that of damage to the complainant which is clearly unrelated to the public health and welfare, are questions that are foreign to the situation presented by the instant case. We submit that in this cause as it comes into court, the complainant may rightly raise but two questions: (a) Damage clearly and plainly unrelated to the public health, safety and welfare and (b)

basic unconstitutionality of *any* ordinance which, in its effort to prevent uses that will be injurious to the public and in its effort to safeguard the public health, safety and welfare, districts a municipality according to height, area, proportion of lot occupancy and use.

Invalidity of one Section does not destroy ordinance.

(6) Then too, the Enabling Act at Section 4366-12 (In foot note on page 41 of Ambler brief) and the ordinance itself at Section 18 (page 26 of Record) provides that invalidity of a part shall not invalidate the *entire* ordinance and it is always the purpose of the courts to effectuate rather than defeat enactments.

THE COMING SMOKE.

SEVENTH: Another picture to which this Court was treated was the painting of the complainant standing upon the site of its present acreage and seeing the approach of factories along the north side of Euclid Avenue and the smoke coming toward the Village and then the purchase of the sixty-eight acres by the complainant. Of course this picture was outside of the Record, and so the Village feels entitled to recite the facts required to aid the Court in seeing the *real* situation. At pages 36 and 37 of our affirmative brief as well as in the Record, it is plainly set forth by the complainant as well as by the defense, that no factory or industry throughout the entire Village comes as near to Euclid Avenue as is permitted by the ordinance. It is a further fact that if one were to start at the Public Square in the City of Cleveland where Euclid Avenue begins and were to walk eastwardly throughout the entire length of Euclid Avenue within the City of Cleveland and were to continue along through the three miles or more of East Cleveland and

even if one were to trudge on from East Cleveland straight through to Painesville—a total distance of thirty miles—there would not be a single factory or a single railroad switch or a single spur coming out to the north side of Euclid Avenue with but three lone exceptions (*none* being in Euclid Village) in that *whole thirty* miles. These three exceptions and the ill effects of two of these three exceptions (Builders supply stations) appear at lower portion of page 105 and top of page 106 of the Record; the third instance also, is in Cleveland and is where the industry itself is *next* to the track while the clerical building thereof is nearer to Euclid, but even that clerical building is 200 or more feet from Euclid. So that if the complainant stood upon its land and if it did "see smoke coming" it was smoke from factories located *next* and *bordering* on the railroad tracks. The smoke does not come from factories on or even near to the north line of Euclid Avenue anywhere within the entire length in Cleveland, nor within 20 miles beyond. This oral picture might have been impressive but it was not a painting of the facts as they exist. Though we have faithfully tried to limit this brief to the province of a Reply, and though we have restrained ourselves from the temptation to "reach out" of the Record and point out many convincing developments since the hearing in the trial court, it is felt that in order to answer the complainant's picture, it was necessary and permissible to do so in this one instance.

OTHER ERRORS IN ORAL ARGUMENT.

EIGHTH: (1) In the course of the complainant's oral argument it was stated that the map at page 26 showed the parcel shortly west of the Ambler property and just at the west edge of the Village as being districted for "U 2" district. Propriety forbade any contradiction of

this and other statements, but it is a fact that this map—unlike the defendant's Exhibit 2 which is among the evidence in the Supreme Court—showed but a so-called "tentative" industrial line which was revised after months of additional hearings and investigations upon that one subject, so that the line came 620 feet from Euclid Avenue and thereby left approximately 1000 feet from the track open for industrialism and for allied uses, and in some places—due to the divergence between the track and Euclid Avenue—the industrial territory extends *much* further than 1000 feet from the track. The experts brought by the industrials before the Commission had stated that the ideal and probably greatest depth required would be about 1000 feet from the track and the Commission and council felt that this ideal could be met without injury to the welfare and safety of the community. So it is not correct to have stated that the tractor plant runs beyond the industrial line, for that plant is well *within* the line created by the so-called "*final*" ordinance as shown in the Defendants Exhibit 2; the line on the page 26 map *not* having been the line at the time of trial below nor since.

(2) Nor was it correct for complainant's oral argument to picture the President of the Ambler company as having long passed away, whereas just above the middle of page 140 of the Record the junior Mr. Ambler stated: "My father *is* President of the Ambler company and always has been." And it was the President of the complainant who laid out Cushman Road (East 204th Street) adjoining the parcel in question and who restricted the westerly side of Dille Road and both sides of the Cushman Road for residence purposes alone and these streets are now almost completely built up with single residences as are the three streets west of the Ambler parcel almost completely built up. Their witness, Witzel, at the lower por-

tion of page 155 of the Record, referring to Cushman Road and Dille Road stated: "There are lots of houses going up there now" (in December 1923) in addition to those constructed during the four years theretofore.

(3) Again, incorrectly but with a perfect freedom, the oral argument pictured Euclid Avenue as a business street throughout, whereas neither the Record nor the facts support this assertion. (See pages 34, 35 and 36 of our affirmative brief.) It is a fact that in Euclid Village, except at the "Center," there is not a single store along either side of Euclid Avenue, and this in spite of the fact set forth in subdivision 4 next hereinafter. It is a further fact that throughout its entire length, Euclid Avenue has many more places of residence than of business, and in Euclid Village that is decidedly true.

As to available store frontage.

(4) The incorrectness of the statement in the complainant's oral argument, as to the small amount of store frontage allowed along Euclid Avenue, will become immediately apparent when the Court finds the following three situations: (a) That just as Mr. Ambler himself as well as all other witnesses testified that there was no demand for stores except that there might be some small additional value at the "strategic corners" (and each and every one of these corners *has been* left open by the ordinance for store purposes); (b) Not a single one of these locations where stores are permitted under the ordinance, has been built upon, even though the territory districted for stores constitutes all of the favorable and "strategic corners." With all of this open and available, and not a single store having been built thereon, it must be apparent that the complainant's effort to capitalize the inadequacy of store frontage, is in sharp conflict with the actual facts.

Hundreds of stores possible along Euclid and two thousand throughout entire Village.

(c) But atop of all this, the Court for itself can see how unfounded the complainant's oral assertion is, when the Village points out that along the North side of Euclid Avenue there are 4381 feet of "U 4" frontage open for store purposes and that on the corners of Cushman, Dille, Chardon, E. 212th, Bliss, Babbitt and Upson Roads (E. 260 St.)—lying immediately next to Euclid Avenue itself—there are an additional 2760 feet—"U 4"—for store purposes and that throughout the entire Village there is the aggregate of 41,530 feet—U4—of *frontage* available under the ordinance for store purposes. The average outlying store does not have a 16 foot frontage, but granting this ample frontage for each store, there would be room for 445 stores immediately on and immediately adjoining Euclid Avenue itself and there would be room for 2582 stores throughout the entire Village. None of these figures count in the space now occupied by the stores on Euclid Avenue at the "Center" of the Village where the only stores along Euclid Avenue are located. There are at this center, but 18 stores and business places altogether including even the smallest, whereas there is yet available along Euclid Avenue and *immediately* adjacent thereto, space for 445 *more* stores. A map of the entire United States can readily be printed upon one page of a book, and yet no one would suggest that this country did not have ample territory. In the same way, though the store frontages appear small upon so small a map, it is a fact that a scaling of this map will disprove the impression attempted to be left by the oral argument of the Ambler company, to the effect that so *small* a frontage had been districted for this purpose. More, much more than for decades can be used, is open for such use; and that too, just where Mr. Ambler

testified they are best located and where the ordinance deemed them to be of no injury to the public health and welfare and where they would aid the general welfare.

(5) Nor was it correct to try to impress the Court with the nearness of the so-called "Collinwood Shops," for it is a fact that these shops are located quite north of St. Clair Avenue way over on 152nd Street in Cleveland and it is a fact that a scaling of the County map by the Engineer, shows the Euclid Avenue sidewalk line in front of the Ambler property to be distant approximately *two miles* "as the crow flies" and over *three and one-half miles* as one travels by the nearest street route, and there are many, many streets and houses and buildings intervening.

(6) As hereinbefore pointed out, it was not correct to say that the oral argument shortly before the decision in the trial Court was upon a demurrer, for it is evident that if that oral argument had been upon demurrer, there would have been no place for testimony, evidence and depositions.

(7) Nor is it correct for the complainant to try to tear down this entire ordinance by an attempt to ridicule some of its definitions, for most of its definitions have been validated and many of them have been substantially affirmed by the Supreme Court of Ohio because they were, in great measure, adopted from cases which the Supreme Court of Ohio—as in the *Cummingham case,* 97 O. S. 130—and the Supreme Courts of other states had therefore expressed as sufficiently definite and explicit to be held legal and valid. These definitions are almost identical with those upheld by the Supreme Courts of New York, Massachusetts, Wisconsin, Illinois and in the recent case upheld by the Supreme Court of Ohio and by other states.

(8) The citation by the complainant to exceptional situations and circumstances may be best answered by page 90 of the affirmative brief where the courts are shown

to have declared that it is the *general* application and not the exceptional instance which must control. Perhaps additional affirmative light may be found at page 396 of 280 Federal Report, where that court—ruling in reference to the Railroad Commission—stated that the practical side of the situation must be considered in interpreting legislation.

Notwithstanding failure to prove damage, the complainant seeks to strike down the Entire Ordinance.

NINTH: (1) In our files we have ordinances from New York on the Eastern coast to Los Angeles upon the Pacific and these ordinances are being sent to the Court in order that it may be seen that though local variations naturally occur, the philosophy and the basis of all of these ordinances are alike. Among these are some of the very ordinances recently held valid by the Supreme Courts of Illinois, Massachusetts, Ohio and California.

THE FEDERAL CONSTITUTION FITS ALL.

(2) The complainant was hardly justified by any but rhetorical reasons to attempt to belittle the Village by referring to its having wrapped about itself an oversized coat, for unlike garments of cloth, the Constitution of the United States automatically fits and equally applies to large and small.

There is not a large Constitution for large cities and a small one for small municipalities and so, though the complainant's simile was impressive upon first blush, it will hardly stand the test of a second thought.

If the city of New York may district all parts of its great corporation so as to prevent injury and so as to bring forth the greatest public welfare, then the same procedure is equally constitutional for even the most mod-

est hamlet in the land, and it is this basic right which the complainant assails and which the trial court has stricken down. Indeed, the Supreme Courts of Illinois and Massachusetts found legal justification in the recent decisions which affected mere modest towns.

(3) The complainant not presenting any specific and concrete case of unreasonableness before this Court, it is earnestly submitted that the complainant ought not to be indulged when it microscopically tries to detach certain lines here and there and then asks that upon that basis the entire ordinance should be stricken down. The trial court in its Opinion sweepingly struck down and annulled the entire ordinance, even though as we now believe this Court will agree—the complainant failed to establish damage except upon the theory of an unregulated right to injure the public welfare; and *the trial court also struck down the entire ordinance upon the basic principle of unconstitutionality.* The many well expressed and reasoned Opinions of the many State courts which ruled before as well as those which have ruled since the decision of the trial court, and the unwillingness of the final courts of these States (including Ohio) to follow the reasoning of the trial Court, persuade the country at large to believe that the Supreme Court will lend its validation to the basic principle of constitutionality.

(3b) We venture to say that many well recognized acts—such as the Internal Revenue Acts, the Sherman Anti-Trust Law, the Clayton Act, the Inter-State Commerce Measure and the countless municipal building codes, tenement house regulations and fire-zoning enactments may be found to have some frailty or some flaw in some one sentence or in some one section, and yet the courts have not annulled and will not strike down these entire enactments for any such reason but will await a specific set

of facts to be presented and will then rule adversely only in so far as such case may require.

(4) Beyond all this, it is a cardinal rule of law that contracts, wills, constitutions, statutes and ordinances must be considered as a whole and that to take out one sentence or one paragraph and to interpret or judge it when it stands alone is not within the established rules of interpretation. The many States of the Union, through this test case, submit to this Court that this Euclid Ordinance, taken as a whole and interpreted as a complete fabric, comes properly within the Police Power and properly serves the public welfare, safety and health.

Not meant as an exordium, but intended as an Aid to this Court.

TENTH: (1) It is to be noted that the complainant filed no Reply to the Answer of the Village wherein the Village alleged that the attempted bringing of tracks, spurs, switches and factories up to the North line of Euclid Avenue would result in a menace and injury to the public welfare, safety and health. Nor, in any part of their proof did they trouble themselves to even *try* to show that this would not result in such injury. They take the position that public welfare and its safety and welfare can not be considered as against their right to use their land "entirely unregulated" as they may see fit. They attempt to answer all by the cry of "damage."

(2) The complainant seems to have breathed into this case the feeling that if its property can not be used for what it conceives to be its greatest advantage, that is: if there has been any damage to the complainant, then this ordinance must fall even though such inhibited use may result greatly to the injury to the public welfare, safety and health. In its proof, the complainant has endeavored to convert this

case into a plain and ordinary "damage case." The Village submits that even if the complainant's land can not be used for what the complainant believes is its greatest advantage and even if there be some loss or damage to the complainant, yet that can not, of itself, be the final or sole test, for if the inhibition of the use is or could be related to public welfare and safety, then the damage (even if there were such) would need to yield to the public good. This appears to have been the pronouncement in too many cases to cite, except that it is found forcefully expressed by the highest court of this land in the case of *Welsh vs. Swasey*, 214 U. S. 91, where the height limitation in the Boston ordinance caused great and admitted loss to the owner of the property and yet that loss was not permitted to be the final and exclusive test, for this Court said that such a loss being but an incident to the proper exercise of the Police Power, the damage must yield to and would not be allowed to exclude and defeat the public welfare. So too, in 97 O. S. 130, *State vs. Cunningham* and *In Re Hadacheck*, 239 U. S. 394.

Indeed, in each so-called "zoning" case cited in our affirmative brief, the complainant alleged damage and in most instances this damage was admitted by demurrer and yet the courts of Massachusetts, New York, California, Illinois, Louisiana, Minnesota, Ohio and other States decisively held that even an admitted damage could not preclude the exercise of the Police Power for the public welfare; but in the case at bar, the complainant seems to have so unceasingly shouted "damage" that it has apparently become the central part of the entire situation and has excluded all consideration of the public welfare and of the Police Powers. The complainant insists and demands that this ordinance must be stricken down in order that the complainant may be allowed and able to use its land "entirely

unregulated" even though such use may and plainly will result in damage and injury to the public welfare; for the complainant plainly manifests and asserts that it is not concerned in the public welfare but that it must be allowed to bring switches, spurs and factories up to the North line of the street even though the public safety and health undoubtedly will suffer therefrom; for they demand that damage shall be the sole test.

(3) But even if damage were the sole test, has the complainant proved any damage?

(a) The Bill of Complaint (on page 6 of the Record) alleged that the complainant's land is particularly adapted for industrial development,	But	The proof shows that though the complainant has owned this land for many years entirely unregulated and though the injunction in January 1924 has re-instated its freedom from regulation, not a single factory or commercial structure has even approached its Euclid frontage.
(b) The Bill alleged that factories had lodged along Euclid Avenue,	But	The proof of the complainant as well as the Defendant shows that no factory has come so near to Euclid Avenue as is permitted by the ordinance.
(c) The Bill (at middle of page 5) went so far as to allege prevailing winds from the north in order to show that the high side of Euclid was already damaged and therefore unworthy of being protected against injurious invasion,	But	The proof fails to disclose even one sentence on the part of the complainant, and the Defendant's proof is directly to the contrary.
(d) The Bill (at top of page 5) alleged the "major usefulness" for the Euclid Avenue land to be for mercantile purposes,	But	Mr. Ambler's own statement showed "very little demand" for such purposes and the testimony of Laronge, Greenlund and others showed a greater and earlier return for residence than for mercantile uses, beside Kunkle's statement as to its "natural and logical use."

(e) The Bill (at middle of page 4) alleged that "the larger part of the territory in the Village between the New York Central Railroad and the Nickel Plate Railroad has been purchased by industrial companies which have established plants or are holding sites thereon for prospective industrial improvements,"

But

The proof shows that in this three and one-half mile area between these two tracks there is not a single industry or factory (except fronting on Chardon or Bliss Roads where there are three or four lumber yards and the like) and the proof shows that all of this vast territory between these two tracks lies *open* and *waiting* industrial development.

(f) The Bill alleges a dearth of available industrial land in Greater Cleveland,

But

The proof showed an almost inexhaustible supply all around Cleveland.

(g) The Bill (in Section 8 at the middle of page 5) alleged that the South or hill side of Euclid has "become less desirable for residence use to persons other than those employed in factories there located and preferring homesites close to their place of employment,"

But

The oral argument of the complainant pictured this hillside as designated for residence purposes because aestheticism desired to protect the homes of wealth upon this exclusive hillside.

(h) The Bill (at page 3) recites the building of the New York Central Railroad in 1850 and the Nickel Plate in 1880 and then alleges the need of *all* this land in order to accommodate factories and industry,

But

The proof shows that in these many years, even including the great war cycle boom, only nine industries (including small coal and lumber yards) availed themselves to this land and only sixteen industries (including even the most inconspicuous) have located in the entire Village throughout all these many years.

(i) The Bill alleges that the zoning ordinance was established for mere aesthetic reasons and was designed to keep the Village as a residential municipality,

But

The proof shows that the ordinance allows all usable land along the railroad tracks to be open to industrialism and that there are 14 miles of railroad frontage open and available within the municipality.

(j) The Bill alleges that the ordinance is designed to exclude and ostracize industry from the Village,

But

The proof shows that 1400 acres (substantially more than one-fifth of the Village) are open and awaiting industrial development.

(k) And, in final the Bill continually alleges great damage and the oral argument asserted $200,000 loss,

But

What proof is there of this? Let us see:—

What actual proof of damage?

(1) In order to find what actual proof of damage there may be, it is but fair to say that the complainant's brief unquestionably tried to show its *strongest* proof and yet, as hereinabove set forth, the complainant's brief is unable to cite this Court to any damage other than that based upon supposititious conditions in striking contrast with the actual facts under the ordinance. And in this connection we ask: Why does the Record disclose that the complainant's zealous witness, Kunkle, *always* hedged his statements of damage with suppositions *contrary* to the facts under the ordinance? Why were the complainant's questions *always* premised upon hypotheses in striking contrast with the conditions created by this legislation? Why did Kunkle never even once testify other than upon the supposition that the whole of the sixty-eight acres was districted for residences right down to the railroad track? Why can't the complainant point to the Record and show one statement where this willing witness in plain English and without suppositions, testified to a damage or loss under the *facts* of the ordinance?

Why is the complainant's *brief* compelled to content itself with but mere similar supposititious conditions when it refers to the testimony of Mr. Witzel? And why is the complainant's brief unable to point to any simple or direct statement of Mr. Ambler other than that founded upon "the whole of the sixty-eight acres being districted for residence purposes," which is plainly in conflict with the facts under the ordinance?

Why did the counsel who examined for the Ambler company require all of his and all of the Defendant's witnesses to predicate their answers upon suppositions at *variance* with the ordinance? Why was Laronge compelled to answer upon the supposition that even along and ad-

jacent to the railroad, residences alone would be permitted, and why was Laronge required to testify on the supposition of completely eliminating the Euclid frontage value and then, if damage was plainly proved, why did the complainant's brief have to bolster its cause by citing that testimony as proof of damage? Why, if damage was proved, was the complainant unable to answer the invitation in the Village brief, by citing this Court to *any* non-supposititious proof on the part of any witness?

(2) Perhaps the complainant might have been able to have cited the Court to at least some testimony showing a damage because the complainant's land is districted against bringing factories and tracks up to Euclid Avenue, as their own proof (pages 18 and 22 of our affirmative brief) showed to be a *necessary basis* of any possible loss. But here, as so many times pointed out by the Village, the question of injury to the public welfare comes into play and such a damage (even if it were to be conceded) does not satisfy the burden which is upon the complainant. Indeed, even upon this score the proof not only fails to be clear in behalf of the complainant, but the evidence of some of its own witnesses and the testimony of Whitten, Stein, Greenlund and Laronge is in plain contradiction thereof and may well be said to have not merely met, but satisfactorily *over*balanced the proof of the complainant upon even that phase. It is to be remembered that if, in years to come, conditions become altered, the districting can and (in accordance with the presumption that officials will do their duty and will not act arbitrarily) will be revised; but then it will be a revision in accordance with the general public welfare (as in Fire Zone district revisions) and not to the damage of the public safety and health, at the dictation of some one individual.

These are cardinal rules:

(3) It is to be remembered that (1) the ordinance is presumed to be legal, that (2) the complainant is under the burden of showing that the ordinance neither *is* nor *could* be related to the public welfare, that (3) the ordinance is not invalid if there could have been a valid basis, that (4) the Court will not measure its judgment or substitute its ideas against that of the legislative division, that (5) in order to be unconstitutional, the ordinance must be shown to have no relation to the health or safety and that (6) unconstitutionality must be plainly and palpably clear; (all of this is treated between pages 80 and 90 of our affirmative brief). The complainant had the duty of satisfying each of these requirements. Can it fairly be said that the proof plainly shows that this ordinance has and could have no relation to the public welfare, safety and health, or that damage was plainly proved, or that the other requisites were satisfied by the testimony in the Record? If the declarations in the Bill of Complaint and if the assertions in the complainant's brief are equal to proof, then perhaps it must be conceded that the complainant has convincingly proved damage and has plainly showed that there neither is nor could be any relation between this ordinance and the public welfare and safety, but if the *Record* is the test, then the Village earnestly submits that the complainant has failed to submit proof to satisfy the necessary requisites.

(4) Apparently the complainant finds its greatest shelter in the words of the trial court. But it is to be remembered that in the very first lines of the Opinion (page 52 of the Record) the trial court stated that it had made *no* "special findings of fact" and that "on appeal, the reviewing court can weigh the evidence when taken in deposition form, *as well as the trial court.*" And it is

to be further remembered that it was physically impossible for the Village to have aided the trial court in the interpretation of the testimony, as the complainant has now tried to do in this Court; but now with all the prominent and important evidence having been set forth in the briefs, it is trusted that this Court will "review and weigh the evidence as well as the trial court." No special findings of fact having been made, it would seem that it would not really require any reversal as to the proof or facts, but that now, with the situation completely before this Court, it will, *de novo*, make its determination as to this proof.

Most respectfully, but as an example of the trial court's mis-conception, it is to be noted that Laronge, Greenlund, Whitten and Stein, all testified that the natural, best, and logical way for the development of the strip along the North side of Euclid Avenue was by using it for residence purposes and that thereby the complainant would get a much earlier return and undoubtedly an even greater return, and these witnesses as well as Ambler agreed that store use was "*without demand*" except that Mr. Ambler thought that at the strategic corners (each and all of which *have* been districted for that very purpose) there might be somewhat greater value for store purposes. (All of this is detailed in this and in our affirmative brief.) Added to this unbroken line of testimony, there is the statement of their principal witness, Kunkle, (at the lower portion of page 92 of the Record), where he stated, "*the natural and logical way for the development of that property immediately north of Euclid Avenue* (which is the 620 foot strip in question) *is by allotment for workingmen's homes*" and yet the Opinion of the trial court, in spite of this testimony and that of Greenlund, Laronge, Whitten and Stein, stated that the normal and reasonable use of this property is for commercial purposes and that therefore there was admitted damage.

It is further evident that the complainant can not find much shelter behind the Opinion of the trial court when it is unable to cite this Court to a single out-and-out statement of any witness to prove the obligations which rest upon the complainant, except by citations founded upon suppositions contrary to the facts or except upon possible references of proof founded upon a use plainly injurious to the public welfare, and even that last proof is generously out-weighed by contrary testimony. If the testimony founded upon suppositions strikingly in contrast with the facts, led the trial court to a mis-conception of the testimony, the complainant can hardly now hope that this Court will blind itself to these suppositions or will be indifferent to the fact that the complainant has been unable to *cite* this Court to any actual proof. The mere declaration of damage in the Bill and the mere insistence thereof in the brief can hardly cloud out the absence of actual proof thereof.

The Village most respectfully submits that the decree in favor of the complainant should, upon the *facts as well as upon the law*, become a decree in favor of the Village.

Subsequent Court decisions do not agree with Trial Court.

(5) Referring, in conclusion, to the Opinion of the trial court in reference to the basic question of unconstitutionality, it is evident that the trial court ruled that there could not be *such* an exercise of the Police Power as would bring it within constitutional limitations. In substantiating its purpose, it quoted from and cited the same case that the complainant's brief emphasized—"*Friend vs. Chicago,*" 261 Illinois 16, though, as pointed out in the Village affirmative brief, there is a long cry from a comprehensive zoning ordinance to the isolated restriction in that comparatively old case. With that sincere and genuine

respect for the trial court which the court richly merits, we feel that our trust requires us to point out that though the Opinion of the trial court was given widespread notice and though the briefs in the recent *Evanston* and *Aurora,* Illinois cases urged the Opinion of the trial court upon the Supreme Court of Illinois, that Court refused to follow this trial court and apparently recognized no contrary ruling to be involved in the *Friend* case, and it held that in its judgment, under both the Federal and the Illinois Constitutions, these zoning ordinances are valid. The Opinion of the trial court somewhat stressed the fact that the Opinions of The Justices was but a moot ruling. However, when the Supreme Court of Massachusetts later had its attention called to the Opinion of the trial court, it, in three successive decisions, stated that it felt these zoning ordinances to be valid under the Federal Constitution. Though the Opinion of the trial court dismisses the favorable decisions of New York as "assumed rather than decided"; thereafter, in the most recent pronouncement of the highest court of New York, that court refused to follow the Opinion of the trial court in the case at bar and once more reiterated its belief that these ordinances are legal under the Federal as well as under the New York Constitutions. In the California case cited in our affirmative brief, the Supreme Court of California had not yet had that case, for it was in but the lower court at the time our trial court ruled. When the California final court did receive the case, the Opinion of our trial court was generously quoted and cited in the briefs. The Supreme Court of California declined to concur in the reasoning of our trial court and pronounced its belief that this ordinance did not offend either the Federal or California Constitutions. Though the most recent decision of the Supreme Court of Kansas was rendered after the objectors in that State had invited their court to the

decision of our own trial court, nevertheless the Supreme Court of Kansas reaffirmed its belief in the legality of this ordinance under the United States as well as under the Kansas constitution. The same is apparent in reference to the cited decisions in the District of Columbia, which ruled favorably after the unfavorable Opinion of our trial court. And so too, in Ohio, our own Supreme Court declined to follow the reasoning of the trial court even though the present counsel for the complainant, as *amici curiae*, urged the Opinion of the trial court against the validity of the Cincinnati zoning ordinance. Indeed, since the pronouncement by the trial court in January 1924, no court of final resort in any State has similarly decided. In each of these cases, both before and since the Opinion of the trial court, damage was alleged and frequently admitted by demurrer and yet these courts, in addition to Minnesota, Wisconsin and Louisiana, ruled that there being an apparent relationship between these ordinances on the one hand, and the public safety, welfare and health on the other hand, they were proper expressions of the Police Power and did not offend against either the Federal or the respective State constitutions.

This judgment is apparently concurred in by the legislatures of thirty-one States which have passed Enabling Acts, by Congress, and by practically every big city in the United States, for these ordinances have been adopted in practically all large cities as well as by hundreds of smaller municipalities and now the States and cities, from coast to coast, trustfully look forward to a final validation by the highest Court of their land.

Respectfully submitted,

JAMES METZENBAUM,

Counsel for the Appellants.

(10)

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In the Supreme Court of the United States

OCTOBER TERM, 1925

NUMBER [redacted] 31

THE VILLAGE OF EUCLID and HARRY W. STEIN,
Inspector of Building,
Appellants,

vs.

THE AMBLER REALTY COMPANY,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

BRIEF ON BEHALF OF THE APPELLANTS.
(On Rehearing)

JAMES METZENBAUM,
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Counsel for the Village of Euclid and the Inspector of Building.

In the Supreme Court of the United States

October Term, 1925
Number 665

The Village of Euclid and Harry W. Stein,
Inspector of Building,
Appellants,

vs.

The Ambler Realty Company,
Appellee.

Appeal from the District Court of the United States for the Northern District of Ohio, Eastern Division.

BRIEF ON BEHALF OF THE APPELLANTS.
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BRIEF ON BEHALF OF THE APPELLANTS.
(On Rehearing)

At the prior hearing of this Cause in this Court, the Village of Euclid filed an Original and a Reply brief.

In this, the Supplemental brief now being filed by the Village upon the occasion of the present rehearing, counsel is desirous of inviting the attention of the Court to but three phases, the first of which is by far the most important and controlling. Indeed, it is believed that this is the first time this particular and important point has been prominently or topically presented to this Court in connection with the subject at issue, although referred to in both of our prior briefs.

PART FIRST

NO APPLICATION—No Refusal.

It is to be remembered that—as hereinafter more specifically pointed out—the pleadings show, the record evidences and in fact The Ambler Company concedes that it never made any application for any permit, never went before the Village Council to obtain any revision or amendment as is liberally provided for by the ordinance itself, never applied to the City Plan Commission for any revision, modification or alteration of the ordinance as it applies to the Ambler Company land, never applied to the Board of Appeals for any relief even though all of these procedures are and were specifically permitted by the ordinance and it never attempted to obtain any amendment or modification though that also is specifically authorized by the ordinance.

On the contrary, The Ambler Company—without any application for revision, amendment or modification of the ordinance and without desiring to build any kind of structure whatsoever—hastened into Court and applied for an injunction against the enforcement of each, every and *all* parts of the entire ordinance. The decree of the Trial Court struck down the *entire* ordinance and enjoined the Village from enforcing any part whatsoever.

I.

The Ambler Company has based its court action upon two grounds:

First—that the ordinance was *fundamentally* and basically in contravention of the Ohio as well as the Federal Constitution;

Second—that the ordinance was unreasonable in its application to the Ambler Company land.

BASIC Unconstitutionality ONLY question open to Complainant.

For the reasons hereinafter set forth, the Village contends that under the conceded circumstances and admitted conditions attendant upon the complainant's course, the Ambler Company neither then had nor has now the right to bring into issue any question other than that the ordinance is fundamentally and *per se* in violation of the Federal and State Constitution.

Though the Village concedes that under a proper set of facts and under proper circumstances the complainant may and would have the right to bring into issue the question of the reasonableness or unreasonableness of the ordinance as it applies to a certain parcel of land, yet because of the facts and conditions admitted by the Ambler Company, it does not have the right, in the present case and procedure, to bring into issue any question of reasonableness or unreasonableness of the ordinance as it applies to its land, even though the Village concedes that the Ambler Company may in the pending case have the right to bring into issue the question of the basic and *per se* unconstitutionality of the ordinance.

We pause to take one further step before the Village attempts to demonstrate that the Ambler Company should be limited to the fundamental question alone:—

It may not be so decisively determined as to warrant its being conceded and yet—because of the desire of the Village, manifested throughout its briefs and argument, to take advantage of no technical claim but on the contrary to concede all ground that it could possibly be expected to grant to the complainant—the Village makes no strong objection to the Ambler Company's contention that it had the right to go into a Court of Equity and to seek a restraining order against the enforcement of this ordinance

on the basic and fundamental ground and for the reason that the ordinance creates a so-called "cloud" upon its title and that the ordinance contains a penal clause which might possibly be visited upon the complainant.

This right to challenge the basic constitutionality probably accrues to the complainant even though it has made no application for a permit, has not attempted to obtain an amendment or modification of the ordinance and has made no appeal to the Board, for it is not strongly denied by the Village that the Ambler Company may have the right to assail the fundamental unconstitutionality of the ordinance without the complainant having taken any of these steps, because the complainant may contend that it is losing a part of the value or the possibility of sale of its property by virtue of the "cloud" created by the ordinance.

UNREASONABLENESS can Not be raised Now.

The Village having taken this step, it now invites the attention of the Court to its contention that under the facts and circumstances admitted by the record, the Ambler Company does not have the right to obtain an injunction on the ground that the ordinance is unreasonable in its application to the Ambler Company's particular parcel.

In order to make its position clear, this particular argument has been divided into parts A, B and C:

Complainant does not now want to build, or use land.

A. Though the record demonstrates (top six lines of page 104 of Record) the pleadings show and their briefs concede that the Ambler Company never made any application, never filed any plan and did none of the things which the ordinance itself permits by way of obtaining revisions, relief or amendments, the complainant neverthe-

less straightway went into Court and attempted to introduce the question of the unreasonableness of this ordinance as it applies to the complainant's land.

If the Trial Court or this present highest tribunal were to ask the Ambler Company if it is complaining because it can not build a factory on its Euclid Avenue frontage, the complainant would necessarily be compelled to concede that it had never in any way applied for any permission to build any factory upon its Euclid Avenue frontage, and that neither in the past has it, nor now does it *want* to build any factory.

So, too, if this Court were to inquire if the Ambler Company is complaining because it can not build railroad tracks or switches along its Euclid Avenue frontage, the complainant would be obliged to concede that it had never taken any steps to obtain any permission to build any switch or tracks along its Euclid Avenue frontage.

In the same way similar questions could be asked in reference to other kinds of construction (such as stores) upon the land in question and in each instance the Ambler Company would have to admit that it had never tried to obtain any permission (by applying for a permit, by making application or by means of amendment or modification or by appeal to the Board) to build *any* kind of construction upon the land in question.

That being true and the complainant never having applied for a permit to build any kind of structure whatsoever, how can a Court be asked to enjoin the enforcement of the ordinance on the ground that its terms are unreasonable in their application to the land in question, when the complainant has never asked for a permit of any kind?

The Village contends that until the complainant has asked for a permit and has been denied the same, the Ambler Company does not have the right to ask the aid of a Court of Equity in decreeing that the terms of the ordi-

nance are unreasonable in their application to the particular parcel of land.

Indeed, the complainant or its successor, may—when the time comes to build—desire to construct just what the ordinance permits, and now to allow an injunction against the enforcement of the entire ordinance upon the guess or mere possibility that the ordinance will *then* prove to be objectionable or unreasonable, is a position untenable and unwarranted in law and in equity.

As hereinabove stated, the Village does not vigorously contend that the Ambler Company is denied the right to pray for an injunction on the ground that the ordinance is *per se* violative of the Ohio and Federal Constitutions, but the Village does contend that until the complainant shall at least have applied for a permit to build some kind of structure and until such permit shall have been denied, the complainant does not have the right to obtain an injunction upon the ground that the ordinance is unreasonable in its effect upon the property in question.

Must not complainant try Remedies BEFORE Pleading Unreasonableness in Court?

B. Indeed, the Village is of the mind that the Ambler Company would be required to go further than merely applying for and being refused a permit before it could obtain the interposition of a Court of Equity on the ground that the ordinance is unreasonable in its terms affecting the land in question, for the Village believes that the complainant would be required to either seek amendment at the hands of the Council as provided for in the ordinance (Section 25, page 25 of Record) and as would at all events be available to any property owner, because—under the State Code upon this subject, Section 4366-11, as well as under the ordinance—the Council could always modify or amend any ordinance, or the complainant ought to be re-

quired to use one or more of the remedial and modifying provisions of the ordinance (Section 23, page 24 of Record and Section 25-D, page 25 of Record) before it obtains a Court's decree on the ground that the ordinance is unreasonable in its application to the parcel in question. (Kindly note last paragraph of page 15 and page 16 of Village Original brief.) But concededly, the complainant neither attempted to invoke any of the remedial provisions nor did it apply for a permit at all, nor does it *wish* to build any kind of structure.

Why Rush into Court when this is Available?

The complainant could very easily at any time, avail itself of Section 25-D of the ordinance (page 25 of the Record) because: (a) That remedy as well as other remedies under the ordinance are always open to everyone, and (b) because, particularly in reference to the property in question, the complainant could and can (under Section 25-D) set out an "area" for industrial use comprising almost its *entire* parcel without requiring any consents of any other property owners and that too, without being affected by any protests under Section 25-B. In this same connection, had a request been placed before the Board of Appeals, it is quite possible and the complainant can not be heard to predict against the fact that (as it has more than once done and as it is authorized under the ordinance) the Board of Appeals may well have recommended to the Council that there should have been some modification or revision of the ordinance as it applied to parts of complainant's land.

These provisions, in reference to revisions, modifications, appeals to the Board and amendments, are identical with many of the zoning ordinances which have been upheld by the Courts of final resort of the various states and are almost identical with the provisions of all of the several

hundred ordinances extant upon this subject. (A great many of these ordinances have been furnished by us to the court.)

Until at least one or some of these remedies are resorted to by the complainant the question of unreasonableness ought not be heard by any Court.

Two Simple Tests.

Indeed, as no application for any factory or industrial had then, or now has been refused, it may be fairly said that the ordinance is, in fact and in practice, not unreasonable, because no one has ever so much as wanted to build any industrial construction or asked to do so, contrary to the ordinance. (In this connection kindly note all of first paragraph on page 105 of the Record.)

Another method of evidencing the fallacy of the complainant's position may be readily found by applying the following test:

Let it be presumed for the moment that the Village would enter this Court and would consent to a decree permitting the complainant to establish stores anywhere at all upon its property.

Would that satisfy the Ambler Company?

The question answers itself in the negative, because the Ambler Company does not wish the mere right to have stores but it wants the "unrestrained and ungoverned" right to use its entire land and every portion of it for industrial and manufacturing purposes and for the attendant uses of tracks, switches and spurs. (Lower half of page 18 and lower half of 19 of Village Original brief.)

The Village contends that until the Ambler Company shall at least have applied for a permit for a factory and shall have been refused, it is not entitled to ask this or any other Court to restrain the enforcement of the entire ordinance, which is the very thing it is asking and the very re-

sult allowed by the Trial Court. In this connection 164 N. Y. 510, 249 U. S. 269 at Syl. 2 and upper portion of 273 and at 274, 248 U. S. at 500 and particularly 26 L. R. A. (N. S.) 842 are illuminating.

Indeed, it may fairly be said that the complainant is really afforded its "day in court" to obtain administrative or legislative relief by these sections and provisions of the ordinance, and that until these remedial processes are at least attempted by the complainant, it ought not be heard in its effort to strike down and nullify the entire ordinance, which is the prayer of the complainant and the decree of the Trial Court. In this connection we would respectfully refer to the following decisions which are not precisely and identically in point and yet are felt to sufficiently pertain to this phase of the subject so as to warrant their here being cited. 111 U. S. 701, *Hagar vs. Reclamation District* at the last two syllabi and 254 U. S. at page 69 as written by Mr. Justice Day. So, too, *Hodge vs. County,* 196 U. S. at Syl. 3 and at 281.

The Village Board of Appeals has held many meetings and has religiously applied itself to the task before it. In several instances it has recommended, under Section 25 (page 25 of the Record) to the Village Council that certain amendments and revisions would be advisable and in each instance such recommendation has been adopted by the Council. The Board of Appeals has had many meetings and has granted such appeals as relieved hardship without invading the safety or welfare of the community. (In connection with this function, kindly see pages 91 to 94 of our Original brief.)

In much the same way, as each Subdivider's plat comes before the Plan Commission, it is able to advise and regulate so as to create through streets, thoroughfares of sufficient width as well as new avenues. Indeed, a new thoroughfare will easily result and eventuate just north of

Euclid and parallel with it, under the ordinance as it now affects the parcel in question, and such a street will be tremendously valuable to the Ambler Company itself. (Kindly note pages 68 and 69 of the Village Original brief.)

This ordinance—as do all similar ordinances throughout the country—offers several speedy and readily-available avenues and remedies, upon all of which the complainant turned its back and straightway hastened into Court to strike down the entire ordinance. Under these circumstances complainant ought not—at this time—be heard on the question of unreasonableness.

The Court would Supplant the Village Officials.

C. If the complainant can obtain the interposition of a Court upon the ground that the ordinance is unreasonable in its effect upon the complainant's land, without the complainant filing any plans, making any application, being refused or resorting to any of the remedial provisions of the ordinance, then—in the judgment of the Village—the Court would really become the administrative officer of the affairs of the Village instead of the Village officials having that right and province; for if a complainant can obtain an injunction upon the ground that an ordinance is unreasonable without the complainant having submitted any plans, made any application or met with a refusal, then that means—in simple and plain language—that the officials of the Village can be overlooked, that they are shorn of their powers and duties and that a Court will substitute itself in performing the administrative duties of the Village in place of its officials carrying on that portion of its governmental affairs. As was said by Justice Harlan in 113 U. S., page 127:

> "And it would be extraordinary usurpation of the authority of a municipality if a Federal Tribunal should undertake to *supervise* such regulations. The

Fourteenth Amendment does *not* impair the Police Power of a municipality."

In this connection kindly see 197 U. S. 11, 198 U. S. at page 6, 242 U. S. at top of page 531.

Complaint of Unreasonableness Not Ripe.

The Village respectfully but firmly urges that the complainant—under the conceded facts and circumstances of this particular case—was without right to urge unconstitutionality upon the ground that the ordinance was unreasonable in its effect upon complainant's land; that the Trial Court was without right or power to hear or decree in reference to that question because of the conceded and admitted circumstances; and that this Court—before which this case comes *de novo* upon appeal—should not permit the complainant to be heard upon the ground that the ordinance is unreasonable in its effect upon the complainant's land, even though the Village does not firmly oppose the right of the complainant to be heard upon the fundamental and basic question of the ordinance being *per se* violative of the Federal and Ohio Constitutions, respectively.

Question Seasonably Raised by Village.

This question—though probably not necessary to have been asserted by any special pleading—nevertheless was seasonably raised by the Motion to Dismiss the Bill of Complaint, filed by the Village under date of July 20th, 1923, and appearing on page 27 of the Record, which Motion was overruled by the Trial Court. This was again seasonably pleaded in the Village Answer as shown at last two paragraphs of page 37 and lower half of 38 of Record. This was also urged in the Village Original brief, and please refer to (4) on page 26; (5) on page 34 and "Tenth" (1) on page 43 of our Reply brief which contains important statements in this connection.

This procedure would make the COURT the ORIGINAL Administrator of EVERY POLICE Regulation.

If this complainant is permitted to be heard at this time and under the admitted conditions, upon the question of unreasonableness of the terms of the ordinance, then every lot owner and every property owner will have the door of the Federal Courts opened through which every property owner may *immediately* enter and plead for an injunction, not only as to a zoning ordinance but also against every Building Code, against every Plumbing Code, against every Tenement House Code and indeed, against every similar state and municipal regulatory measure, and that door would be opened even though the complainant never applied for any permit whatsoever, never asked for permission to build any particular kind of structure, never filed any plans and never met with any refusal.

If the ruling of the Trial Court in this respect be held to be proper, then the Courts will have superseded municipal officers and each person conceiving himself aggrieved, will find the way open to immediately enter the Court Room without having even so much as applied to or having come before the respective municipal officials or board, whose duty and authority it is to administer the Building, the Tenement, the Plumbing, the Fire Zone Codes and the many other regulatory ordinances.

Unreasonableness is but mere MOOT Question Now.

The Village respectfully submits that under the record and the admissions existing in this case, the complainant should not be heard upon the question of reasonableness or unreasonableness of the terms of the ordinance in its effect upon the land in question; at least, until the complainant shall have applied and shall have been refused and

perhaps indeed, until the complainant shall have resorted to the available provisions for modification and amendment.

Indeed, this was the specific ruling in the Zoning case of *West vs. the City of Wichita, Kansas,* and in *Ware vs. the City of Wichita*—234 Pacific Reporter 978, decided April 1925—wherein the Court stated:

> "The zoning ordinance may be unreasonable when applied to a specific use which an owner desires to make of specific property, but until such a situation is presented there is no actual controversy between the owner of property and the city concerning the zoning ordinance. The owner is not entitled to litigate under this statute questions which may never affect him to his disadvantage. To speculate upon *possible* uses that the owner or his vendee might desire to make of the property, and seek a judgment determining them, is simply to ask the opinion of the Court with reference to a situation that may never arise." (From the copies of this ordinance which we have supplied to the Court, these remedial sections (21) will be found to be like those in the case at bar.)

So too, in the even more recent zoning case of *Dynzer vs. the City of Evanston*—decided December 1925—the Supreme Court of Illinois at pages 792-3 wrote as follows:

> "The twenty-seventh section permits changes and amendments in the boundaries of districts or the regulations established, and prescribes the proceedings to be taken to effect such changes or amendments. * * * We can not upon this record say that the ordinance is an unreasonable exercise of power, without rational relation to the public health, morals, safety, or general welfare. If Appellant feels that she has been aggrieved by the classifications of the zoning ordinance her *recourse* is to the Board of Appeals. The action of that body is reviewable by the Courts." (Copy of this ordinance is before court. Its amendment and its

remedial Sections—on its typewritten page 1 and on its printed page 13—are substantially the same as the Euclid Ordinance.)

In the notable case of *Wulfsohn vs. the City of Mt. Vernon,* 150 N. E. 120, the Court of last resort of the state of New York, in November 1925, at the bottom of page 124 and in syllabus 9 emphasized this same situation by saying:

> "Appellant complains that the regulations for setbacks are unreasonable because they do not graduate such setbacks to the size of the building but require the same area for a small as for a large building. Such an argument is not available to him. The only question which he is entitled to argue is that these setbacks are unreasonable in the case of a building four or five stories high and designed to accommodate nearly 600 people. It will be *time* to consider whether they should not be reduced in the case of a smaller building when somebody desiring to erect *such* smaller building complains of them as unreasonable." (A marginally indexed copy of this ordinance is before the Court.)

In 235 U. S. at the lower portion of page 26, Mr. Justice Holmes speaking for the Supreme Court in *Pullman Co. vs. Knott* wrote:

> "It is enough to say that a tax is not to be upset upon *hypothetical* * * * possibilities, if it would be good upon the facts as they are. *Keokee Consolidated Coke Co. vs. Taylor,* 234 U. S. 224."

To somewhat the same effect but not completely or wholly applicable to the present point, may we refer to the recent Opinion of Mr. Justice Stone, in the third syllabus of *Roberts Co. vs. Emerson, Secretary of State of Illinois,* decided April 12th, 1926, and *Hunter vs. Board of Levee District* at Syl. 6 and page 265 of 204 U. S.

Quite in point is the entire page 336 and the upper two lines of 337 of Chief Justice Waite's Opinion in the

prominent collection of "Railroad Commission Cases" found in 116 U. S., where the Court concluded by saying:

> "Whether in some of its details the statute may be defective or invalid we do not deem it necessary to inquire, for this suit is brought to prevent the commissioners from giving it *any* effect whatever as against this company. * * * Many questions may arise under it unnecessary to be disposed of now, and we leave them for consideration *when presented.* * * * When the Commission has acted and proceedings are had to enforce what it has done, questions may then arise as to the validity of some of the various provisions, which will be worthy of consideration, but we are unable to say that, as a whole, the (Mississippi) statute is invalid."

And yet, in the case at bar, the complainant asked and the Trial Court granted a complete nullification of the entire ordinance, and that too, without the complainant ever having applied or ever having been refused any permit and without the complainant then or now desiring to build any kind of structure.

Further Comment.

In this connection the Village desires to add three further comments:

(1) As set forth on page 18 (Subdivision 12) and at Subdivision (3) of page 49 of the Village Reply brief, the Village has no fear of meeting the facts as established by the Record itself, for—as set forth on pages 15 to 26 and 34 to 42 of the Village Original brief and pages 4 to 8 and 47 of the Village Reply brief and part "Third" hereinafter —the Village feels that instead of the proof preponderating in favor of the complainant as is required of complainant, The Ambler Company really failed in its proof and, on the contrary, the Village established what was really unneces-

sary for it to establish, to-wit:—a clear disproof of complainant's charges and a preponderating proof to the *contrary.* (Part "Third" of this within brief and pages 28 to 32 of the Village Original and paragraphs 10 and 10 b on pages 15 and 16 and (8) on page 13 and page 12 of the Village Reply brief.);

(2) That the complainant has failed to comply with the requisite of establishing the fact that there not only is no relation but that there *could* not be any relation between the pubic safety and welfare on the one hand and this ordinance on the other hand; (pages 83, 89 (middle) and 62 of the Original and page 49 (3) of the Village Reply brief); and

(3) The Village herein prominently urges the point to the effect that the complainant ought not be heard on the question of unreasonableness because the complainant has never applied for any permit nor sought any remedy, but it does not urge this point in place of or in substitution for the point that the complainant has failed in its burden of proof and has failed to establish the lack of all possible relation to the public welfare. On the contrary, the Village urges this present point in this Supplemental brief in *addition* to what has been urged in the Village Original and Reply briefs to the effect that the complainant has failed to support its burden, to establish its charge and to prove the absence of any possible connection between the ordinance and the public welfare. (Please see pages 80 to 90 of our Original brief and page 49 of Village Reply brief. To *these* pages we respectfully again *urge* the attention of the Court, for therein are presented Cardinal Rules which importantly control actions of this character.)

PART SECOND

As to BASIC unconstitutionality.

And now, in reference to the complainant's contention that the ordinance is, *per se*, violative of the Ohio and of the Federal Constitutions, the Village submits the following for the attention of this Court:

(1) Though the Bill of Complaint did urge the unconstitutionality of the ordinance upon basic and fundamental grounds, it is a fact that in the oral argument of counsel for the Ambler Company, the following statement was made by the Ambler counsel at the previous hearing of this cause before the Supreme Court itself:

> Mr. Baker: "I want to say, in the first place, that I do not assume the burden of demonstrating the general and comprehensive invalidity of all zoning ordinances; and I have no special argument to make against an abstract philosophy on that subject."

It is believed to be fair to say that by this statement (which was not the only one of its kind employed during the Ambler counsel's presentation) the position of the Ambler Company was relegated principally, if not exclusively, to the question of unconstitutionality upon the ground of unreasonableness and since the Village is trustful that it has hereinabove demonstrated that the question of unreasonableness cannot and may not form the basis of a decree under the facts and circumstances admitted in this case, the complainant may not unfairly be said to stand before this Court without any strong or real ground of asking for court intervention.

Additional Favorable decisions SINCE both Village briefs.

(2) Indeed, in addition to the phalanx of states (including Ohio) as shown at pages 95 to 130 of the Original brief of the Village, which have held these Zoning Ordi-

nances legal and valid under the respective State and Federal Constitutions and in addition to the further decisions evidenced by pages 51 to 53 of the Village Reply brief, as having sustained these Zoning Ordinances, it has *since* been recorded by the State of Rhode Island; partially by the States of Maine and Florida and decisively by North Dakota's and Massachusetts' highest tribunals, that these Zoning Ordinances are looked upon as being constitutional and valid.

Since the filing of our Original and Reply briefs, in the case of *Stephens vs. the City of Providence* (133 Atl. Rep., 614), the Supreme Court of Rhode Island, speaking through its Chief Justice Sweetland, so recently as June 11th, 1926, held that:

> "Separation of business and industrial activities of the city, from its residential portions reasonably administered, may be supported in behalf of the public safety, public health, comfort and convenience"

and upheld the exclusion of an "Apartment House" from a "Single and Two Family Dwelling" district; further holding that the exclusion of business and industry from residences was even more clearly supportable.

The *Wulfsohn* case, referred to at page 98 of the Village Original brief is now reported in 150 N. E. R. 120, being the declaration made so recently as November 1925, by Chief Justice Hiscock and every associate of the New York Court of Appeals in favor of the validity of these ordinances.

Likewise, since the filing of our Original and Reply briefs, the Supreme Court of North Dakota, speaking so recently as March 1926, through Justice Burke—former Treasurer of the United States—announced that

> "Chapter 175 of the laws of 1923, granting the power to regulate and restrict the height, * * * the density of population, the location and use of buildings

is a legitimate exercise of the police power and is not in conflict with the Constitution of North Dakota, nor the Fourteenth Amendment to the Constitution of the United States." (208 N. W. Rep. 711.)

This decision, concurred in by every associate on that bench, upheld the exclusion of an "Apartment House" from "Two family and single residence" districts.

In May 1926, the Supreme Court of Massachusetts, for the fourth successive time upheld the validity of these ordinances, in the case of *Wood vs. City of Boston*, 152 N. E. R. 62.

With these additional decisions it may fairly be said that the leading states of the Union and indeed an aggregate of 16 states, have, through their highest tribunals, so firmly stamped their approval and validation, that the question of fundamental unconstitutionality has successfully been denied, literally, from coast to coast.

Indeed, the States of Ohio, Massachusetts, California, North Dakota, Illinois, Rhode Island, and the District of Columbia, as well as, partially, Maine and Florida have added new and emphatic confirmations since the ruling of our Trial Court and the States of New York, Kansas, Louisiana, Massachusetts, Minnesota and Wisconsin have reiterated their belief in the validity of these ordinances since the Trial Court in the case at bar ruled that these ordinances are fundamentally in contravention of the State and Federal Constitutions.

Because some of these decisions, referred to in our Reply brief, were then of such recent dates, we were unable to give this Court exact citations thereto. For this reason—without repeating any of the favorable State Court decisions set forth on pages 95 to 132 of our Original brief —we now offer specific citations to the since-rendered

favorable decisions referred to but not specifically cited at pages 51 to 53 of our Reply brief:

Illinois:

Deynzer vs. City of Evanston, 149 N. E. R. 784, 1925;
Burns vs. City of Aurora, 149 N. E. R. 790, 1925.

California:

Fourcade vs. City of San Francisco, 238 Pac. Rep. 934, 1925.

Louisiana:

State, ex rel. Gianygrosso vs. New Orleans, 106 So. R. 549, 1925.

Massachusetts:

Bradley vs. Board of Zoning Appeals of Boston, 150 N. E. R. 892, 1926.

These are in addition to those cited in this Supplemental brief.

Not a "Damage Suit."

In all of the many favorable decisions there have been admitted losses to the complaining parties, but these losses have not been permitted to defeat the exercise of the police power, for the Courts have recognized that cases involving the police power are not mere "damage suits." 233 U. S. at 669; 229 N. Y. 320.

On the other hand, the complainant as well as the Trial Court have so breathed into this case as to have literally tried to convert it into a mere "damage case."

This we have fully referred to at the lower half of page 43 and all of 44 of our Reply brief as well as at pages 51, 52 and the citations at pages 87 and 88 of our Original brief, to which pages we respectfully refer the Court at this time.

As to Churches and New Streets.

In the oral argument presented by the counsel for the Ambler Company at the original hearing of this cause, an effort was made to try to capitalize the provision which refers to churches. In the Village Reply brief at page 22, the theory of this provision was fully explained and it was frankly stated that the Village had never dreamed there could be any possible injury done under that provision but that—because of the recent discussion thereof in the Ambler oral argument—it was now frankly recognized that this might be possible, just as various parts of Federal and State legislations have been found to be better if revised or improved in certain respects. The Village Council while dealing with several other proposed revisions, has undertaken to amend this provision so that, by the time this case is reargued and decided by this Court, churches, schools and libraries will be permitted the highest classification and the freedom of every part of the municipality so that there may never be any possibility of anyone ever again raising this possible question. Indeed, the question was never raised by the Ambler Company until it reached its oral argument in this Court and apparently no one had theretofore or has since, raised it, because—as stated at page 26 of our Reply brief—every church has immediately been granted the right to go wherever it pleased in the Village. Beyond all this, the Reply brief pointed out that the Ambler Company admittedly did not want to build any church but wanted to have "the unregulated right" to injure the safety and the property of church going folks as well as others in the Village, so that it might derive "the greatest possible revenue from the wholly unregulated right to industrialize and railroadize all of Euclid Avenue itself."

PART THIRD

Unanswerable Facts:

In presenting this Third and final or reviewing phase, the Village submits that:

(1) The Trial Court specifically refrained from making any special finding of fact for, as stated by the Court on page 52 of the Record:

> "This case is obviously destined to go higher. On appeal in equity cases, the reviewing Court weighs the evidence and when taken in deposition form, it can do so as well as the trial court; hence it is unnecessary to make special findings of facts."

Beyond this important admission, this case comes here *de novo*, on appeal and this Court has had more opportunity to study the facts and the Record and the testimony than the Trial Court concededly had. (In this connection kindly note (3) on page 3 and (11b) on page 17 of our Reply brief.) Indeed, the parties were directed to argue the law and the facts to the Trial Court when much of the testimony had not been given and when most of that which had been given had not then been transcribed. Although all of the testimony was finally furnished to the court, the argument was *prior* thereto and counsel's brief was almost necessarily unattentive to the facts presented by the testimony, because the brief was necessarily being written during the nights of the very days when the testimony was being taken before the notary, and was required to be filed within one day after the testimony was completed.

(2) It is conceded that the Village of Euclid was incorporated many years before the complainant purchased the parcel in question.

(3) Because the Village felt that the preparation of the narrative form of testimony was in the nature of a

trust, counsel for the Village did not prepare this, but on the contrary, the Record in this case was prepared by a gentleman who is conceded to be the "Dean" of Court Reporters in this part of Ohio; a man who is a lawyer and is recognized as the author of writings that have attracted more than local attention. This gentleman did not record the case or the testimony at any time. At no time whatsoever did counsel for the Village of Euclid even confer with this gentleman. The typewritten testimony was handed to this man and without any interference whatsoever, he prepared the Narrative form of the Record.

No corrections were made by either side. The Record was printed just as prepared by this gentleman, Mr. Charles W. Chesnutt. Both sides have copies of the original, complete and full testimony. This reference is made here, because of pages 9 and 4 to 8 of our Reply brief.

(4) That the map appended to the Bill of Complaint and appearing on page 26 of the Record is not the map which obtained at the time of the trial, nor does it now obtain. Under the Amendment pleaded in the Village Answer (pages 36, 37 and 56 of the Record) and under the correct map (Defendant's Exhibit 2) the Industrials—after long and careful study by the Commission—(middle of 178 and lower portion of 206 of Record) are allowed just what the Industrials' own experts had informed the Planning Commission would be the ideal (about 1100 feet average throughout the Village and in most places the ordinance allows even more) industrial width and latitude (See last paragraph of page 206 of Record and 56 of our Original brief and 3rd paragraph of 154 of Record) from the railroad. As stated by Mr. Ambler himself in the 14th to the 11th last lines of page 141 of the Record:

> "There are no manufactories within that district I know of that come out 1200 feet from the Nickel Plate

track to the South (Euclid Avenue) throughout this entire tract in Euclid Village."

This revision of the so-called "Industrial" line from the original-tentative line, was made only after many months of additional study and conference with the railroad and industrial representatives and property owners, and only after their own experts (summoned from Chicago and other cities as well as locally) had testified before the Euclid Commission that the line of about 1100 feet was the usual and desirable latitude and area for such purposes. The Commission thereupon recommended and the Council adopted this.

In connection with this careful study please see 240 U. S. 513: "As the law was drafted by the Commission after years of observation and study * * * we might well hesitate to say there was no doubt upon the question."

(5) The complainant made no attempt to prove any usefulness of its land for store or similar commercial purposes; (Ambler's testimony at middle of page 137 of the Record and pages 25 and 26 of Village Original brief and page 199 of the Record as well at lower half of pages 12 and 16 of Village Reply brief and bottom of page 11 of Ambler's own brief.)

(6) That more store frontage along and adjacent to Euclid Avenue, as well as throughout the entire Village than can be used in fifty years, is freely allowed by the ordinance for store purposes. (Pages 38 and 39 of the Village Reply brief.)

(7) That the complainant conceded that store purposes would be almost completely limited to "strategic corners"; (page 38 of Village Reply brief and Ambler's own testimony at middle of page 137 of Record); and *all* of these "strategic corners" *are* admittedly open for stores, under the ordinance.

(8) That though provision is made for over 400 stores on and immediately next to Euclid Avenue at the "strategic corners" (as set forth on page 39 of our Reply brief) there is not a solitary store on either side of Euclid Avenue in the entire *seven miles* of both sides of Euclid Avenue frontage within the Village except the 26 (including barber shop, vacant stores and post office) which are now in the "center" and upon the "fringes of the center" of the Village. (See Village Large map—"Exhibit X" and lower half of page 38 and all of 25 and 26 of our Original brief.)

(9) That even in the two and one-half miles of Euclid Avenue frontage in the *Cleveland* territory—with street after street built up—which adjoins the Village, there are but two inconsequential, intermediate clusters of but 12 stores in total, until one reaches another small "center" of about 12 stores at the very westerly end of the Cleveland area which adjoins East Cleveland. (See Village Large Map—"Exhibit Z.")

(10) That the complainant has frankly sought the destruction of the ordinance in order to bring industry, factories, switches and spurs right up to the Euclid Avenue frontage because this was its conceded and admitted best way of obtaining the greatest value from its property; (bottom of page 93 and top lines of page 94 and page 89 of Record and *particularly,* quotations at lower half of page 18 of Village Original brief and just below middle of page 145 of Record and Ambler's own testimony at second last paragraph of page 137 and Witzel's testimony at lower portion of page 149 and third and fourth paragraphs of page 161 of Record).

(11) That this right to prevent such a use under the admitted facts and conditions of Euclid Avenue would be a nuisance and a probable danger which can be prevented by

common law without requiring the aid of any zoning ordinance, (page 18 [11-d] of Village Reply brief and citations there offered and lower half of 105 and top of 106 of Record and pages 21 [second paragraph] and 51 of Original brief).

In the present instance, some of these uses would be not only possibly but very probably and apparently injurious to the community and to the neighborhood. It would be no answer if the complainant were to say that some factories or industries might not prove dangerous or welfare-injuring or not subversive of the public health, because if the ordinance is stricken down as the Trial court has done, then the complainant is free to build *any* kind of plant and to run its switches and spurs up to Euclid Avenue as it undisguisably insists it has the right to do and wishes to do in order to get the greatest financial return from its land, regardless of the injury to the public safety, health and welfare.

And hence the Trial Court should not have enjoined the Village against preventing such a nuisance and menace and possible injury. Very illuminating on the subject of *possible* damage and dangers being permitted to be prevented by a municipality, is the case of *Pierce Corporation vs. City of Hope,* 248 U. S. 498, where Justice Holmes wrote, at page 500, in part, as follows:

> "Then as to the allegation that plaintiff's plant is safe and does not threaten the damages that led to the ordinance being passed, there are limits to the extent to which such an allegation can be accepted, even on demurrer; as in the old case of a plea that the defendant threw stones at the plaintiff *molliter* and that they fell upon him *molliter,* 'for the judges say that one cannot throw stones *molliter.*' As was well observed by the Court below 'we may take judicial notice that disastrous explosions have occurred for which no satisfactory explanations have ever been

offered. The unexpected happens.' * * * If it were true that the necessarily general form of the law embraced some innocent objects, that of itself would not be enough to invalidate it or to remove such an object from its grasp. Whether circumstances might make an exception from this principle need not be considered here."

(In this connection as to danger, please see pages 105, 106, 161 of Record.)

(12) That the Trial Court struck down the entire ordinance and destroyed it *in toto* (page 61 (8) of the Record) and that by its so doing, the Trial court opened the way for the complainant to bring switches, tracks, factories and every and any kind of construction and possibly-injurious use right up to the very sidewalk line of Euclid Avenue;

(13) And that if the decree of the Trial court were to be affirmed, the complainant who now faintly seeks to cloak its purpose under the guise of a claim to some day possibly use its frontage for store purposes, would be completely freed from all effects of the ordinance and would find its way to its admitted, conceded and unconceded desire to industrialize right up to Euclid Avenue with its switches, spurs and factories, even though that would be an apparent menace and an injury to all surrounding property, to greater Cleveland itself and to the entire Village and its inhabitants.

(14) The testimony of Mr. Kunkle may possibly leave the impression that the Village of Euclid is generously occupied by industrial plants, because Mr. Kunkle's testimony is, in part, so worded as to inter-blend and create no clear line of demarcation between the factories within and the factories without Euclid Village. (As for example all of page 69 which is likely to mis-impress as referring to

Euclid Village until one is set right by the seventh line of page 70 of the Record. So too, the middle portion of page 71.) For fear that the Court may be misguided by this "rapid-fire—salesman-like" testimony, the attention of the Court is invited to the following:

Actual facts as to stores and industries.

(a) There are but sixteen industrials within the entire Village of Euclid, when counting even the most inconsequential, such as a small coal yard. (Pages 99 and upper portion of 100 of the Record. Will the Court here kindly refer to page 36 of Village Original brief.)

(b) That there is not a solitary industry within the entire Village of Euclid that comes so close to Euclid Avenue as permitted by the Zoning Ordinance. (Ambler's own statement at 14th last to 11th lines of page 141 and last paragraph of page 103 of Record.)

(c) That running northwardly off Euclid Avenue to the Nickel Plate track, are numerous streets within the Village, and each and all of these streets are devoted to residence lots or are actually occupied by homes and residences (From middle of page 100 through 101, 102, 103, 104, 105 of the Record and also please see Village large map,—"Exhibit X.")

(d) That, indeed, this very same situation obtains in the Cleveland territory as well, outside of and next to Euclid Village, where there is a succession of streets, running from Euclid Avenue to the Nickel Plate track, occupied by homes and dedicated to residence purposes. (See Village large map "Exhibit Z.")

(e) That throughout the entire *thirty miles* of length from the Public Square of Cleveland, through Cleveland, East Cleveland, Euclid Village, Wickliffe, Willoughby, and

Painesville, comprising a frontage of sixty miles on the two sides of Euclid Avenue, there is not a single industry or factory or spur or switch which comes out to Euclid Avenue except two coal yards, and two supply yards, in that entire *sixty* miles of frontage, and these few "yards" were established years ago and cannot be used as a criterion by even a stretch of imagination. (Second paragraph of page 21 of Village Original brief and lower portion of 35 and 26 and "Tenth" (1) on page 43 of our Reply brief.)

(15) That in the enumeration of the industries and factories as given by Mr. Kunkle, he has covered a wide and large territory—much of it completely outside of and remote from the Village of Euclid and indeed everyone of these named factories—whether within or without the Village of Euclid—are located upon and next to the railroad track and do not come out to Euclid Avenue, and many of them are miles away from Euclid Avenue (such as Coit Road and Ivanhoe Road on page 69) and miles outside of the Village, (such as E. 105th Street on page 69, which is about 6 miles away) even though—in the manner used by Mr. Kunkle—one not knowing the territory might, at times, be led to believe that these factories are in the vicinity of Euclid Avenue or are close to Euclid Village. (Stein's testimony—pages 99-100 and last paragraph of 103 of the Record.)

(16) And in the same way, what the testimony of their witness Witzel may possibly suggest is similarly misleading because it refers to certain stone quarries as lying south of Euclid Avenue, whereas these quarries are miles south of Euclid Avenue, are not considered within the Village of Euclid and have no influence, either reflected or proximate, upon the Euclid Avenue situation, for people who pass Euclid Avenue day in and day out do not even know that these quarries exist because they are so small, so inactive and so far removed from Euclid Avenue.

(17) As uncontradictedly brought out by witness Stein, virtually the whole south side of Euclid Avenue was then—1923—and many more large parcels have since been allotted (in this connection the Village Large map—Exhibit X—is very important and informing) for or actually occupied for residence purposes—modest homes—or for charitable purposes and admittedly can not be used for any other purpose because of the steep incline and altitude of the South Side of Euclid Avenue, (last two paragraphs on pages 104 and middle of 125 of Record), and great portions of the territory lying north of Euclid Avenue between Euclid Avenue and the Nickel Plate track—is either actually occupied by homes or is allotted for and restricted by deed to residence purposes alone. (From third paragraph on page 100, all of 101, 102, 103 and Village Large Map—"Exhibit X.")

Some Guides from Ambler's own conduct.

(18) That, as conceded by Amblers, they themselves laid out their own land by running residence lots from within a few feet of Euclid Avenue almost to the Nickel Plate track, on both Dille Road and Cushman Road, and they themselves recognized that the utility for factories was along the railroad track because they reserved and sold the property along the railroad track as being the only part adaptable and appropriate for industrial purposes and upon this is located The Dille Road L..mber Company. (Top of page 147 of the Record.) And these residence lots are immediately next to the present parcel in controversy.

A better picture of this may be gotten from the Village large map —"Exhibit X".

(19) So too, the other Ambler parcel about a quarter of a mile east, presents another striking example of Ambler's own judgment in contradiction of what the com-

plainant is now contending for. Mr. Ambler testified at the bottom of page 136 that his father's other parcel of land does *not* come out to Euclid Avenue but that there are houses on and north of Euclid Avenue and then the industrial parcel begins and runs to the Nickel Plate track. This parcel is valued by Mr. Ambler himself at $8,000.00 per acre (last paragraph of page 136 of Record) whereas his willing witness—Kunkle—in the last paragraph of his testimony on page 73 places the valuation at $10,000.00 per acre, and both of these valuations were so placed in spite of the fact that the easterly parcel lies about 600 or 700 feet back or north of Euclid Avenue with houses and residences between it and Euclid Avenue. Finally, when being examined by counsel opposed to him, Mr. Ambler—recognizing the apparent inconsistency of his position—tried to cure his predicament by dragging in the statement that this unimpaired valuation was due to the fact that the easterly parcel had "frontage on the main road, Chardon Road," whereas: (a) Ambler and every witness did and had to agree that Euclid Avenue and not Chardon Road is the main thoroughfare, and (b) Chardon Road is but a secondary street or by-road (see Pltf's as well as Deft's maps) and (c) this parcel of Ambler's has a length from east to west, of 2000 feet (Ambler's own statement at lower part of page 140 of Record) and a very generous width, whereas its frontage on Chardon is over in one corner of this acreage and consists of only about 155 feet on Chardon, with no other easterly or westerly street or frontage outlet. This "limp"—we submit—was hardly enough to have undone the admission which Mr. Ambler as well as the facts themselves made plain.

Indeed, this easterly parcel not only has no Euclid frontage because houses occupy the space of 600 to 700 feet between it and Euclid Avenue, but the parcel does not have

even Railroad frontage nor more than a mere "neck" of street frontage, and yet Mr. Ambler was required to admit at page 141:

> "It is still worth $8,000.00 an acre, although it has the frontage of Euclid Avenue taken up for residence purposes to the extent of 650 or 700 feet, on account of its frontage on the main road, Chardon Road."

In addition thereto, that parcel is admitted to be of less value because it lies considerably east of the litigated parcel and is therefore less valuable than the parcel now before the Court. (See Ambler's own Statement to this effect, at middle of page 138 of Record.) And yet Mr. Ambler himself places practically the same value upon that easterly parcel, about which there is no complaint, as he placed upon the parcel in litigation, for he ascribed to the parcel in litigation the valuation of only $10,000.00 an acre (page 135 of Record) even if it is completely served by railroad switches and even though it is "unrestricted in every way." There can be but one lesson drawn from this additional example of the Ambler people's own conduct, namely: that the easterly parcel which—according to all witnesses—is concededly less valuable, is nevertheless given practically the same value by Ambler and by Kunkle as Ambler himself ascribed to the unrestricted industrialized parcel now before the Court, and that too, even though the easterly parcel has houses between Euclid Avenue and the easterly parcel to almost exactly the same degree as is provided for by the zoning ordinance itself. (Page 141 of Record.) It is furthermore to be remembered that Amblers purchased this easterly parcel after the houses in question, between the easterly parcel and Euclid Avenue, were constructed. (In this connection, kindly refer to page 24 and upper third of 25 of Village Original brief.)

What clearer guide or lamp of experience could be had than by this conduct and by this admitted testimony of Amblers themselves?

It may be interesting for the Court to note that their other witness—Witzel—just below the middle of page 150 of the Record, ascribed a valuation of $12,000.00 per acre to this easterly parcel, which is even greater than Ambler claims for the industrialized and "entirely unrestricted" use of the litigated parcel in question.

(20) And that—as set forth on page 46 (g) and (e) of the Village Reply brief—there are 1400 acres of available industrial territory within the Village of Euclid, most all of which lies open and welcoming industrial use. (See Ambler's own testimony at second paragraph of page 143 of Record; Village "Exhibit 2," large map—"Exhibit X," and particularly, pages 39 to 42 of Village Original brief.)

(21) And that there are a total of 14 *Miles* of Railroad frontage within the village, open for industrial use—enough for 2000 ground floor factories. (Page 42 and top of 43 of Village Original brief.) And yet the Bill of Complaint charged that this ordinance "seeks to erect a dam and hold back the flood of industrial development by destroying all the value of land in the village etc."

(22) That the "Labor Supply" and "Balanced Territory" is desirable and indeed necessary, is admitted by all of the witnesses including Ambler himself (just below the middle of page 143 and the last lines of page 146 of the Record and bottom of page 31, all of 32 and top of 33, 67 and 66 of Village Original brief).

(23) That the southerly side of Euclid Avenue must of necessity be used for residence lots, because of the topography and precipitous slope from the Euclid Avenue sidewalk southward. Though Mr. Ambler, in the lines just below the middle of Page 138 of the Record, has charac-

terized this land as usable for "A low class of residence, couldn't be the lowest, but it would be for the poor laboring class," yet these people and this land are entitled to the protection of health, safety and comfort, which would be necessarily and plainly invaded if the factories, industrials, switches and tracks come out to the opposite side of Euclid Avenue.

So too, witness Kunkle's statement, just below the middle of page 94 of the Record while being examined by Ambler's own counsel.

In this connection, it may be interesting to note that—as set forth in the Village Reply brief on pages 27, 28 and 29 at "g" on page 46—counsel for the Ambler Company attempted to picture this south side protection as being meant for "exclusive" purposes and to protect the homes of wealth on this south side, whereas Ambler himself has characterized this south side as usable for but "the poor laboring class." It really is neither in fact, for its use is and in the future will continue to be for average American homes and families—some quite extensive and others very modest.

(24) That even today—as set forth in (a) on page 45 of the Village Reply brief—no factory on the Ambler parcel has come even remotely near to Euclid Avenue, though this Ambler parcel—because of the Trial Court's injunction—has been open and completely unregulated for well on toward three years and though it always was open and unregulated except for the few months during which the ordinance was applicable to that parcel. Indeed, one more guiding lamp may be found in the experience of the Ambler Company by pointing out—as shown on the Village large map, "Exhibit X"—that the only industrial which has come upon this land has built its plant immediately next to and upon the railroad track itself. What clearer demon-

stration could be offered than by this actual and completely to be seen plant?

Very Indicative.

(25) That complainant's own witness—Kunkle—conceded that the logical use for the strip bordering on the northerly side of Euclid Avenue is for working people's homes, just as the ordinance itself provided. (Page 92 of Record)

The Trial Court has plainly stated that it has made no special finding of facts. Nevertheless the Trial Court declared that the normal use and development of Plaintiff's land along Euclid Avenue is for general trade and commercial purposes, particularly retail stores and like mercantile establishments.

It may be true that the future and removed use may ultimately be for this purpose but it can not now be said —either from the Record or otherwise—that the present or immediate or even early use will be for such purposes. The statement of the Trial court is at variance with *every* witness who spoke upon this subject.

Euclid Avenue in Village is Not a business street Now.

We invite the attention of this Court to the statement of their witness—Mr. Kunkle—at the lower portion of page 92, to the effect that

> "the natural and logical way for development of that property immediately north of Euclid Avenue is by allotment for working men's homes."

In the same way Mr. Ambler himself testified at the middle of page 137 of the Record:

> "If unrestricted, so that this would be permitted, the value of that frontage of 200 feet deep would *not* be much in excess of that at the present time, on ac-

count of its being a little *beyond the present demand.* There would be a few strategic locations, as corners, and lots adjacent to considerable development, where there would be a demand for business, where that value would be greater than $20.00 to $25.00 a foot front."

As evidenced by pages 34 and 35 of the Village Original brief and pages 12 and 14 of our Reply brief, it is too apparent to require citation in order to show that Laronge and Greenlund and Stein and Whitten emphatically and logically testified that Euclid Avenue in the Village of Euclid is not a business street and that there is no demand for store use.

Greenlund said, at page 195:

"I am contending that this is allotment property today and ready and ripe for development. It is *not* ready and ripe for development as factory property, even in small parcels."

And at page 187:

"Euclid Avenue along there (in Euclid Village) is likely to work out as a commercial street *eventually,* but *not now.*"

So too, Laronge, at page 199 of Record:

"There is *no* demand for that frontage (Euclid Avenue) for retail business property even if it were unrestricted" * * *

"All of that property referred to could be disposed of *more* readily as residence sites, at the present time."

Witness Stein stated, at page 128:

"In my judgment the Ambler tract is worth *more* for homes than for factories, because there is no factory value, no factory demand."

Mr. Whitten—recognized authority—after careful survey and study, testified at page 119:

> "I would say that it *is* desirable to secure a strip of residential property north of Euclid and between Euclid and the industrial property. That would result in a *greater* value for industrial land in that section, because the chief drawback to the location of industry, especially along the south line of the Nickel Plate, is the poor labor supply, the fact that the labor has to be *hauled* to that section."

Once more Greenland said; at top of page 183:

> "It *would* be for the *best* interests of the entire population of Euclid to work out a plan for establishing a line 630 feet (north) of Euclid Avenue * * * in accordance with the ordinance. * * * If it grows in a haphazard way, without any thought of the future, you will find that Euclid Avenue will be more congested, the traffic situation will be almost *unbearable*. It will mean discomfort, danger, inconvenience, loss of time and almost everything that is not for the general welfare."

In the face of the fact that Ambler himself, Ambler's witness—Kunkle—and all five of the Village witnesses united in declaring that Euclid Avenue within the Village is not ripe for and is not a business street, the Trial Court impressed into the Record a diametrically opposite conclusion and impression.

With every respect for the Trial Court which is earnestly entertained by the Village and its counsel, it is earnestly urged that neither court decree nor judicial fiat can convert non-business property into commercial land, nor can an unsupported statement of a Trial Court be permitted to govern the Supreme Court itself, especially in a case which—in the words of the Trial Court—

> "is obviously destined to go higher, and on appeal in equity cases, a reviewing Court weighs the evidence, and *when taken* in *deposition form* it can do so *as well* as the Trial Court; hence it is unnecessary to make special findings of fact."

In this connection we would further invite attention to (4) on pages 38 and 39 of the Village Reply brief, which show the provision for several hundred stores on and at the "strategic corners" of Euclid Avenue.

Euclid Not an Industrial Street.

No witness said that the Euclid Avenue *frontage* is or soon will be fitting or ripe or "normally to be used" for factories or attendant switches and tracks. Yet the trial Court's decree will permit that very use.

Not a "Damage Suit."

(26) In leaving this "THIRD Part" of this Supplemental brief, the Village begs to remind the Court that this is not a "damage" suit. In this connection reference is made to "k" on page 46 as well as pages 47 and 48 of the Village Reply brief, to the effect that there is no proof on the part of the complainant of any loss except (a) that loss which might result from the complainant being disallowed to bring its nuisance-producing tracks, switches and factories out to the Euclid Avenue frontage; a use which may be prohibited without the employment of a zoning ordinance on the generally recognized principle of forbidding apparent and probable invasions of the public health, safety and welfare; or (b) a loss predicated upon the *assumption*—distinctly *contrary* to the facts—that the ordinance permits residence alone throughout the *whole* of the approximately 1800 feet from Euclid Avenue to the Nickel Plate Railroad, whereas, in fact and in truth, the ordinance permits all industries for the entire stretch from the railroad, southward toward Euclid Avenue, for an average distance of 1100 feet, or about 70% of all the unbuilt land between the Nickel Plate and Euclid Avenue, throughout the 4 mile length of the Village. This fallacious assump-

tion and wholly unwarranted basis for the alleged proof of loss, is, we trust, quite convincingly set forth on pages 4 to 8 and 10 to 12 of our Reply brief and 16 to 32 of the Village Original brief. We trust that the Court may find it fitting to again refer to these pages.

But even if there had been such proof as the complainant is required to have submitted, and even if it had not been founded on an assumption contrary to fact or on a permission subversive of public welfare, it is a generally recognized principle that loss which comes from a proper exercise of the police power is not such a "taking" as is forbidden by the Fourteenth Amendment. 250 Mass. 170; 150 Northeastern Reporter at syllabus 6: 207 U. S. 79 at page 87 and citations at pages 87 and 88 of Village Original brief.

What Complainant seeks.

The Ambler people are asking the Court to strike down the *entire* ordinance.

They are not asking that stores alone be allowed.

As to stores, they admit that there is no demand and they concede that there is only a possible future and prospective need. In this connection they themselves concede that only the "strategic corners" would be usable for store purposes, and it is to be remembered that none of their land is at any "strategic corner" and that all strategic corners *are* and have all along been available for store use, under the ordinance.

So that the question of stores is a question that need not be seriously considered at this moment. On the contrary, what they are asking is that the entire ordinance be stricken down so that when it is stricken down, they can use their land right up to Euclid Avenue for manufac-

turing and industrial purposes as well as for switches and spurs. (Pages 18 and 19 of Village Original brief.)

Indeed, if this sounds somewhat radical it is radical only because that is the very thing which the complainant is asking; if the Court is shocked by this statement, then the shocking is due to the complainant's request and attitude.

In fact, not only is it the request of the complainant that the entire ordinance should be stricken down so that they can use their land for spurs and tracks and factories right up to Euclid Avenue, but it is a fact that the Trial Court *did strike down* the *entire* ordinance (page 61 of Record) and that the Trial Court did thereby give to the complainant the very right to bring switches and spurs and factories and industrialism right up to Euclid Avenue itself. But the Trial Court never said Euclid Avenue is *industrial* nor does the Record permit of an assertion that Euclid Avenue in Euclid Village is an Industrial or a business street. No witness even intimated it was industrial, and yet, by the decree of the Trial court, the Ambler Company is free to satisfy its undisguised and asserted desire to bring switches and industry up to Euclid Aveune itself.

For this reason, we pause here to beg this Court not to permit itself to be deluded or ensnared by any pretense that the complainant is merely seeking the right to establish stores along the Euclid Avenue frontage, for it is conceded that there is no market or demand for stores (Ambler's testimony on page 137), but what the complainant seeks is to bring spurs and tracks and factories right up to Euclid Avenue; to have its land "wholly and entirely unregulated"; its testimony was completely given over to substantiation of this right; (Bill of Complaint; pages 18 and 19 of Village Original brief and page 135 of the Record) its values were almost completely limited to

the valuation under the right to have factories and industrialism come right out to Euclid Avenue (concluding part of second last paragraph on page 89, top lines of page 94, middle of 135 and pages 18, 19 of Original and 47 of Village Reply brief) and its *prayer* is to the effect that the *entire* ordinance should be nullified. (Page 12 of Record.)

This prayer was granted by the Trial Court. (Page 61 (8) of Record.)

The Village of Euclid says to this Court that any effort or pretense on the part of the complainant to picture this case as one intended to obtain for the complainant the right to establish stores, is a subtle mispicturing; this Court will not be deluded by any play upon the chords which are attuned to store purposes, because such an effort is as unfair to this Court as it is to the people of Euclid Village, for if this Court affirms the decree of the Trial Court, then this Court will be saying to the Village of Euclid that not merely stores but factories, switches, engines and tracks may come right out to the Euclid Avenue line —that it is "entirely and completely unregulated." Such a ruling and such a decree would cause the people of Euclid Village, of Greater Cleveland as well as throughout a good portion of northern Ohio to literally gasp, for it would be equivalent to giving that right along the outlying portion of Connecticut Avenue in Washington itself.

Not because there is an air of exclusiveness in the Village, not because there is any attempt to establish aestheticism, but because with or without a zoning ordinance, no tracks, no switches, no engines and no factories ought to be permitted along the main thoroughfare that leads through Cleveland, East Cleveland, Euclid Village, Painesville and miles beyond.

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Not because there is an air of exclusiveness in the Village, not because there is any attempt to establish aestheticism, but because with or without a zoning ordinance, no tracks, no switches, no engines and no factories ought to be permitted along the main thoroughfare that leads through Cleveland, East Cleveland, Euclid Village, Painesville and miles beyond.

Question of Unreasonableness NOT open to Ambler NOW.

This phase of the subject should not be confused with our other contention to the effect that since the complainant never applied for any permission to build any kind of a store or structure and since it never filed any plan nor took any appeal to the Board, nor sought any of the afforded remedial reliefs, it does not have the right to assail the entire ordinance *en bloc* and *in toto,* nor does it have the right to take a lantern in hand and to search for every possible real or imaginary defect when, as a matter of fact, the complainant has never asked for permission to build *any* kind of structure whatsoever and therefore any claimed defect or pretense under the aforesaid imagined conditions, are really not open to the complainant and are not rightly to be urged by the complainant under the present circumstances.

Likewise, though we may concede that the complainant does have a right of action *in presenti* through the avenue of an equitable proceeding, yet that right should not be confused with the pretended right to have the entire ordinance stricken down on the ground of unreasonableness, in the absence of complainant having applied for a permit, having taken any appeal, having sought any of the remedies afforded by the ordinance itself or having evidenced any intention of building any kind of structure at all.

Brief of Amici Curiae.

We wish here to advert to the brief filed by the National conference on City Planning, as *Amici Curiae.* With no intention of criticism and with a fitting respect for this brief, the Village nevertheless feels that in defense of its own position it does not wish this brief, like its predeces-

sor in the Trial Court below, to prejudice any of the rights of the Village, for (a) the Village earnestly finds itself unable to subscribe to several of the doctrines urged in this brief just as they were urged in the Trial Court, and (b) in addition thereto the Village—having studiously refrained from resting upon citations of so-called "nuisance" and "semi-nuisance" cases as supporting zoning ordinances—the Village can not conscientiously subscribe to the citation of such cases in the brief of the *Amici Curiae*. (Kindly note disclaimer at middle paragraph of page 76 of Village Original brief.) (c) Some of the other citations are not fully accurate, among these particularly being the North Dakota decision, which has long since been favorably ruled upon by the Supreme Court of that State and is no longer confined to the favorable opinion of its lower court.

Reports of New York Investigation Commissions.

We do respectfully ask that this Court refer to the Reports of 1913 and 1916 issued by the New York Investigating Commission and the Appendices thereto, copies of which—bound in red—we have placed before the Court. (References to the more prominent parts of these Reports will be found at pages 47, 48, 62, 63, 64, 67 and 68 of our Original brief.) We have also placed Ordinances of municipalities in about twenty-five states before this Court and have tried to include among these, the ordinances which have been held valid by the various State highest courts. Each of these many ordinances has been marginally referenced to the Euclid ordinance, in order that the Court may see that all of these ordinances are basically and in many provisions identically like the one at bar.

This Supplemental brief being in Addition to Village Original and Reply briefs.

The Village respectfully suggests that this Supplemental brief is not intended to displace the Original or the Reply briefs of the Village. It is earnestly requested that the Court may read the Original as well as the Reply briefs of the Village which were filed at the time of the prior hearing of this cause in this Court, so that the decisions and contentions of the Village as set forth in the two previous briefs filed by it, may be once more clearly in the mind of the Court.

Though this ordinance has been in effect since November 1922, it has never (excepting in one minor case which was promptly decided in favor of the Village) been assailed by any law suit but the present litigation.

Each year has seen a greater number of homes being built within the Village. As shown on page 55 of the Village Original brief and on page 105 of the Record, in the year 1923 (immediately following the enactment of the ordinance) the residential construction was approximately one and one-half million dollars for homes, while the factory construction for that year was but $50,000.00.

In 1924 there were 491 residences and similar buildings constructed, with a valuation of almost $1,300,000.00. In 1925 these buildings totalled to the number of 520, with a valuation of almost $1,750,000.00, and in the eight months of 1926, there were 330 buildings of this character with a valuation of almost $1,200,000.00.

The factory construction in 1925 was only $60,000 and for the eight months of 1926 was less than $35,000, even though it is conceded that fourteen miles in length with four railroad frontages, constituting 1400 acres of land lies open and awaiting industrial development. That acreage constitutes approximately one-fifth of the entire

village, which is the concededly ideal ratio between industrial and residential acreas. (Ambler's statement at middle of page 143 of Record and bottom of pages 31, 32 and top of 33, all of 66 and 67 of the Village Original brief.) During all this time not a single Industrial has even applied for a permit which has been refused.

CONCLUSION.

If communities are to be denied the right to do these things which, if left undone, threaten to undermine the very purpose for which municipalities are formed and for which civic government is created, then how are our American cities and villages to carry on and present a liveable and worthwhile environment and condition?

In the words of our own Ohio Supreme Court, in *Pritz vs. Messer,* in passing upon an almost identical zoning ordinance, this ordinance is not only a valid and proper safeguard of the public interests, safety, health and welfare at the present time, but in addition thereto "this problem must be viewed from the standpoint of coming generations as well."

The outlying and suburban portions of our country are emerging from their isolated and "Village-like" conditions and are rapidly approaching the station where even the suburban towns are concerned with traffic and living congestion that present new and original problems. With these revisions and new conditions come new problems. Mr. Justice McKenna speaking for the Supreme Court of United States in January of 1917 in the cause of *Merrick —Commissioner—against Halsey and Company* (242 U. S. at 586) described the position of the Court in reference to newly arising conditions, by saying:

> "It is to be borne in mind that the policy of the State and its expression in laws must vary with cir-

cumstances. And this capacity for growth and adaptation we state, from Mr. Justice Mathews, in *Hurtao vs. California,* 110 U. S. 516, 530 is the 'peculiar position and excellence of the common law.'

It may be that constitutional law must have a more fixed quality than common law, but, as was said by Mr. Justice Brewer in *Muller vs. Oregon,* 208 U. S. 412, 420, that 'it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action.' This, however, does *not* mean that the form is so rigid as to make government *in*adequate to the *changing conditions of life,* preventing its exercise except by amendments of the organic law."

The legislatures of 31 States, by adopting State Enabling acts after investigation, have evidenced their respective judgments that zoning is constitutional. Almost every large city, from coast to coast, has indicated its opinion of validity, by adopting such ordinances. Municipalities—hundreds of them—located in 41 States of the Union have, through their respective councils and able legal departments, expressed their thought that the Constitution is not opposed to such measures and have enacted such zoning regulations. Congress itself has expressed its judgment that these regulations do not offend the Constitution, by adopting such a code for the District of Columbia.

This is not a radical or sectional or hasty movement. On the contrary, it is country-wide. It has come because American cities have seen not merely a desire but a very need and necessity for such regulatory provisions, in order to make present and future conditions livable,—in brief—in order to fulfill the very purpose for which municipalities were founded.

By reason of the testimony contained in the Record, for the reasons set forth in the Original, in the Reply

briefs and in this Supplemental brief, it is earnestly trusted that this Court may find it fitting and proper to reverse and set aside the decree of the Trial Court, to enter a decree for the Village, to hold that the question of unreasonableness is not now open to the complainant, to find that in keeping with the actual testimony in the Record there is in reality no unreasonableness and—in final—to answer the hopes and the trusts of the many states of the Union, of the hundreds of municipalities throughout the country as well as the almost thirty million people who are earnestly looking forward to a validation by this, the highest Court of the land, of the fundamental right to enact these zoning regulations for the protection of the safety, health and welfare of the people.

Respectfully submitted,

JAMES METZENBAUM,

Counsel for the Village of Euclid and Harry W. Stein, Inspector of Building.

In the Supreme Court of the United States

October Term, 1925.

Number 665.

The Village of Euclid, Ohio, and Harry W. Stein,
Inspector of Buildings for the Village of Euclid,
Appellants,

vs.

The Ambler Realty Company,
Appellee.

On Appeal from the District Court of the United States
For the Northern District of Ohio.

BRIEF AND ARGUMENT FOR APPELLEE.

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In the Supreme Court of the United States

OCTOBER TERM, 1925.

NUMBER 665.

THE VILLAGE OF EUCLID, OHIO, and HARRY W. STEIN, Inspector of Buildings for the Village of Euclid,

Appellants,

vs.

THE AMBLER REALTY COMPANY,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF AND ARGUMENT FOR APPELLEE.

The opinion of the District Court in this case is reported in *Ambler Realty Company v. Village of Euclid, et al.*, 297 Fed. 307.

JURISDICTION.

No question was raised as to the jurisdiction of the District Court of the United States in this action and no question is raised here as to the jurisdiction of this court on appeal.

The jurisdiction of the District Court rests upon the fact that the Bill of Complaint charged the invalidity of an ordinance of the Village of Euclid as being in violation of the Fourteenth Amendment to the Constitution of the

United States and the District Court held the ordinance void as being in violation of that amendment.

The decree in the District Court was dated January 31, 1924, (Rec. p. 61.) The petition for appeal was filed March 31, 1924, and allowed April 1, 1924, (Rec. p. 63). The direct appeal to this Court as perfected under Section 238 of the Judicial Code, 36 Stat. L. 1157, the issues presenting

> "a case that involves the construction or application of the Constitution of the United States" and also a case in which a "law of a state is claimed to be in contravention of the Constitution of the United States."

That an ordinance of the Village of Euclid is such a law of the State of Ohio and that this Court has jurisdiction in a direct appeal from the District Court for the Northern District of Ohio is established in *Penn Mutual Life Insurance Company vs. The City of Austin,* 168 U. S. 685, 694; *Home Telephone & Telegraph Co. vs. Los Angeles,* 227 U. S. 278.

THE QUESTION TO BE DECIDED.

The question to be decided is whether Ordinance No. 2812 of the Village of Euclid, an alleged comprehensive zoning ordinance, imposing a variety of restrictions upon the use of lands within the village limits, is or is not a violation of the rights guaranteed to the Ambler Realty Company, an owner of land therein, by the Constitutions of the United States and of the State of Ohio.

It will be necessary hereafter to state more at large the limits of the police power and the applicable constitutional restraints.

STATEMENT OF THE CASE.

The Ambler Realty Company, plaintiff below, is a corporation, organized under the laws of the State of Ohio, for the purpose of owning, holding and dealing in real estate. It owns, in the Village of Euclid, defendant below, about 68 acres of land. The Village of Euclid is a municipal corporation of the State of Ohio, is a suburb of the City of Cleveland and a part of the general metropolitan and industrial district of which the City of Cleveland is the center.

A map of the Village of Euclid is found in the printed record opposite page 26. There was introduced in evidence but not printed, plaintiff's Exhibit B, (Record, 69) which is a recent map of the City of Cleveland and its adjacent suburbs. This shows the whole of the metropolitan district in question, which extends for about nineteen miles along the shore of Lake Erie and southerly therefrom in an irregular semi-circle with a varying radius of eight to ten miles. The Village of Euclid is located in the northeasterly part of such district and would appear to be part of the City of Cleveland if one did not know of the arbitrary division by corporation lines. The territory of said Village is roughly rectangular in shape, three and a half to four miles each way, the northerly boundary being the shore of Lake Erie.

There were also introduced in evidence (Record, 69) plaintiff's Exhibits D to H inclusive, not printed in the Record. These are U. S. Topographical Maps, dated 1903 to 1907, and show the ground elevations of said metropolitan district and incidentally the street layout and other development of the territory as of that time. When these maps are compared with said Exhibit B, the rapid extension of the whole district in the period since 1903-1907 is shown. Such maps show the larger parts of the City of

Cleveland and the Village of Euclid to be located on a flat plane, elevated 30 to 50 feet above the waters of Lake Erie. To the south of said plain the ground surface rises rather sharply to what, in the southern part of the Village and the easterly part of Cleveland and the other suburbs, is known as the "ridge." The land to the south of this rise is comparatively high and in the southeasterly section of the district, in Cleveland Heights and Shaker Heights, is developing as high-class residence property (Record, 138). The Cuyahoga River, with some small laterals, is shown running northerly through said district into Lake Erie.

The City of Cleveland was founded in 1796 upon a small area of land at the mouth of the Cuyahoga River. With the beginning of its large industrial and commercial development, the city expanded to the larger flat plane above described and gradually covered it to the foot of said "ridge," such development being first in the form of a business center with an encircling residence development. The continued industrial and commercial growth caused business to encroach on such residence territory and to break through the same, particularly along the lines of the various railroads, which include The New York Central, The New York, Chicago & St. Louis, commonly known as the Nickel Plate, both running easterly and westerly through the district, and the Pennsylvania, Erie, Baltimore & Ohio, Cleveland, Cincinnati, Chicago & St. Louis and Wheeling & Lake Erie, coming into the district from the south.

The general plan of street development for the district is based on main thoroughfares, centering in the City of Cleveland. Three of these main thoroughfares are known as Lake Shore Boulevard, which runs easterly near the shore of Lake Erie, through the easterly part of the

City of Cleveland, the Village of Bratenahl and then through the Village of Euclid; St. Clair Avenue, located to the south of Lake Shore Boulevard, following much the same course; and Euclid Avenue, which is the next main thoroughfare to the south. The territory tributary to said Lake Shore Boulevard is largely devoted to residence purposes. St. Clair Avenue runs through a very fully developed industrial and business district in the City of Cleveland and in Euclid Village, most of its course, throughout its entire length, being not far from the New York Central Railroad. Euclid Avenue though originally a fine residence street in the City of Cleveland, is now one of its main business arteries. In the cities of Cleveland and East Cleveland just west of the westerly line of the Village of Euclid, this thoroughfare runs through a new and expanding industrial district and the natural development of the territory tributary thereto in the Village of Euclid, particularly on the north side of the said street, would be for business and industrial purposes.

The New York Central and Nickel Plate railroads run through the Village and are both main lines of said systems. A little westerly, in the City of Cleveland, the "belt line" of the New York Central goes off southerly through the southern part of the City of Cleveland.

In the City of Cleveland the streets running generally in a southerly direction from Lake Erie are numbered consecutively from the center of the City. This numbered system is continued into Euclid Village, the westerly boundary of said Village being approximately on the line of East 185th Street. About the year 1910 there were less than ten industrial establishments having railroad connections east of East 105th Street in said district, (Record, 69), only one of which was in Euclid Village. Today such establishments have increased to approximately 175 (Record, 69). In

Euclid Village proper nearly all of the territory between the New York Central and the Nickel Plate tracks is either developed with industrial plants or is being held for that purpose, (Record, 71). South of the Nickel Plate Railroad and almost adjacent to the 68 acres of land owned by the plaintiff is a large automobile plant, (Record, 70), and toward the center of said Village and on the strip averaging 1700 feet wide, (Record 87, 88 and 89) between the Nickel Plate tracks and Euclid Avenue, are various smaller industries (Record, 70). Just across the easterly line of said Village is a large brick plant and several other large industries adjacent to said railroad. (Record, 71.) The section of said metropolitan district most in demand for industrial development is that tributary to the New York Central and Nickel Plate railroads in the easterly part of the City of Cleveland and in Euclid Village. (Record, 72.) The section just westerly of Euclid Village and particularly in the vicinity of East 152nd Street along the New York Central Railroad and the Ivanhoe Road district to the south along the Nickel Plate is where the most extensive industrial development has *lately* taken place. (Record, 72 and 151.)

The location of the particular lands of The Ambler Realty Company described in the bill is shown blocked in red on the zoning map of the Record, opposite Page 26. This particular block of land is one of the most desirable for factory development in the district. (Record, 72.) Said zoning map, as put in evidence, showed the crosshatchings of the zoning districts, in which said 68 acres was included, under the red coloring.

The population of Euclid Village in 1910 was approximately 2,000. (Record, 1.) Its population now is probably between 5,000 and 7,000. (Record, 28.) In addition to the street and transportation systems of the City of Cleveland

and the Village of Euclid being more or less in common, the public water system of the City of Cleveland also serves the Village of Euclid and even territory to the easterly and southerly of the Village of Euclid some of which is located in the adjoining county of Lake. (Record, 82.)

There was introduced in evidence plaintiff's Exhibit A, an aerial photographic map, (Record, 67) of the westerly part of Euclid Village and adjacent parts of Cleveland, and also Exhibit I to Q inclusive, (Record, 84), which are photographic views of much of the territory between Euclid Avenue and the Nickel Plate Railroad in the Village and show the larger part of such strip to be vacant land with frontage upon Euclid Avenue, a main general traffic thoroughfare, and the railroad on the north, from which switches are readily put into the territory for the purpose of serving industrial plants.

On the hearing of the case below, both sides produced real estate experts, who gave their opinions of the *market value* and *demand* for the said 68 acres belonging to appellee and various other vacant lands in the Village, lying between Euclid Avenue and the Nickel Plate Railroad. These witnesses were Kunkle, Ambler and Witzel, testifying for appellee and Greenlund, Laronge and Stein, testifying for appellant.

EVIDENCE OF VALUE AND DAMAGE.

The witness Kunkle testified that said 68 acres as a whole considered unrestricted as to use, had a value of $9,000 per acre (Record, 72), and if restricted to residence use, one-third of such value (Record, 85). The Euclid Avenue frontage of said tract (150 to 200 feet deep) if sold separately from the rest, considered as unrestricted against business, he valued at $150 to $175 per foot front (Record, 85) and if restricted to residence purposes, at $60 per foot front (Record, 85). The frontage along Euclid Avenue of this parcel is about 1800 feet (see description bill, Record, 6, and admissions of answer, Record, 35). The vacant acreage "between Chardon Road and Bell Avenue" (East 219th Street), north of North Street, he valued at $10,000 per acre unrestricted (Record, 73) and if restricted to residence use, at one-third of such value (Record, 85). The vacant lands east of Bliss Road to the east limits of the Village, as shown on the map, between Euclid Avenue and the Nickel Plate he valued, considered as unrestricted property, from $6500 to $3000 per acre (Record, 73), the value being graduated down from Bliss Road easterly; if restricted to residence use, at one-third of such value (Record, 85). The Euclid Avenue frontage on the northerly side of the street from Bliss Road to the easterly limits of the Village, if sold off separately to a depth of 200 feet, he valued, not restricted against business, at $75.00 per foot and restricted to residence use at $35.00 to $40.00 per foot (Record, 86). All the vacant land in the strip between Euclid Avenue and the Nickel Plate railroad, having a frontage on said railroad, is being held for industrial development (Record, 73), and even where there are tracts or parcels of land in said strip that do not front on the railroad, the same are equally valuable for industrial development in combination with the other

parcels between them and the railroad right-of-way (Record, 94).

Witness Witzel placed the value on Ambler tract of 68 acres at $8500 to $10,000 per acre, considered as unrestricted property (Record, 149), and if restricted to residence use, at $3,000 per acre (Record, 154). The Euclid Avenue frontage of the tract to a depth of 150 feet he valued at $150 per foot, if unrestricted, and if restricted to residence use, at $60 per foot (Record, 149). The vacant acreage between Chardon Road and Bell Avenue, north of North Street, he priced at $12,000 per acre unrestricted and at $3500 per acre if limited to residence use (Record, 150). The vacant land between Euclid Avenue and the Nickel Plate railroad, east of Bliss Road, unrestricted, he valued at $6,000 to $2,000 (Record, 150), the value decreasing as you go further east; if restricted against business, at $2500 per acre and graduated down as you go east (Record, 156). The Euclid Avenue frontage on the north side, east of Bliss Road, valued separately, he put at $30 to $50 per foot, if unrestricted, and $10 per foot less if restricted against business, explaining that there was little present demand for business development on this frontage (Record, 157). The greatest demand for industrial sites in the Cleveland industrial district he said was between East 152nd Street in the City of Cleveland and Chardon Road in Euclid Village (Record, 151).

Witness Laronge, testifying for appellant, placed the value of the Ambler tract, unrestricted, at $8,000 per acre (Record, 196), and if limited to residence use, at $2,000 per acre (Record, 202). The Euclid Avenue frontage, sold separately to a depth of 200 feet, he valued at $100 per foot, if available for business and at $60 to $75 per foot restricted to residence use (Record, 197). The vacant lands in the Village between Chardon Road and Bell Avenue,

north of North Street and south of the Nickel Plate tracks, he valued at $5,000 per acre for industrial purposes and $2,000 per acre, if limited to residence use (Record, 203). The vacant lands between Euclid Avenue and the Nickel Plate, east of Bliss Road, exclusive of the Euclid Avenue frontage, he valued as follows: That between Babbitt Road and the east limits of the Village, for manufacturing purposes, $3,000 to $4,000 per acre (Record, 198); for residence purposes, $1,000 to $1,500 per acre (Record, 202); between Bliss Road and Babbitt Road, $4,000 per acre unrestricted (Record, 198), and $1,000 to $1,200 per acre, limited to residence use (Record, 202). The Euclid Avenue frontage from Bliss Road to the east, sold off to a depth of 150 feet to 200 feet, he valued, if not restricted against business, at $75 to $100 per foot front (Record, 199), and if restricted to residence use, at $30 to $50 per foot (Record, 199).

Witness Greenlund, called by appellant, testified that the Ambler tract of 68 acres could be ideally developed for industrial purposes with switches set into the tract from the Nickel Plate railroad (Record, 190), but he thought the Euclid Avenue frontage could be more advantageously sold for other uses. He placed the value of the tract as raw land for residence allotting purposes, at $5,000 to $6,000 per acre (Record, 195); if cut up to sell in small parcels for industrial purposes at $8500 to $12,000 per acre (Record, 195). The Euclid Avenue frontage thereof to a depth of 150 feet, not restricted against business, he valued at $150 to $300 per foot (Record, 186), and if limited to residence use, at $75 to $100 per foot (Record, 180). The acreage east of Bliss Road, for industrial purposes, he priced at $3,500 to $2,000 per acre (Record, 182); the Euclid Avenue frontage thereof, sold separately to a depth of 150 feet along this same strip, he priced at $100

to $300 per foot, if not restricted against retail business, and at $40 to $75 per foot, if limited to residence use (Record, 182). He said that Euclid Avenue, within the Village of Euclid, was destined to become a business street (Record, 187), and that "It is fair to assume that business and manufacturing will locate north of Euclid Avenue and dominate that section" (Record, 194).

The witness Ambler gave the value of the 68 acres belonging to the appellee at $10,000 per acre for industrial development and at $2,000 per acre if limited to residence use (Record, 135). The Euclid Avenue frontage he thought could best be sold with the acreage behind. This frontage to a depth of 150 to 200 feet, he valued, if not restricted, at $100 per foot (Record, 136), and if restricted to residence uses, at $40 per foot (Record, 146). The vacant land between Chardon Road and Bell Avenue, north of North Street, he valued at $8,000 per acre, unrestricted (Record, 136), and if limited to residence use, at $1,800 per acre (Record, 137). The vacant acreage from Bliss Road to the easterly limits of the Village, he valued at $8,000 to $2,500 per acre, the greatest value being at Bliss Road (Record, 136). For residence development, he put its value at $1,750 to $1,000 per acre (Record, 137). The frontage on Euclid Avenue, east of Bliss Road, sold separately to a depth of 200 feet, he valued at $20 to $25 per foot, and only a little more if not restricted against business, because he thought that there was little, if any demand for business along that frontage, except at certain strategic corners (Record, 137).

The reason the land between Euclid Avenue and the Nickel Plate railroad has a low value for residence development is because most of it is rather low land between the ridge to the south and the Nickel Plate right-of-way (Record, 73, 94, 145), except a narrow strip toward the

easterly end of the Village, and homes built in such section would lie in close proximity to the industrial development along the two railroads.

The deposition of the witness Stein was taken and his testimony as to values in such form was submitted to the court below, subject to the objection of appellee. Whether his testimony was considered by the court is not certainly shown by the Record. In our opinion, he did not properly qualify as an expert (Record, 130, 131); he knew nothing about values generally in the metropolitan district (Record, 134). He considered adjacency of industrial plants to transportation facilities for employees as unimportant and even thought that track frontage for factory location was not a factor on which to base values (Record, 133). Generally he placed lower values on the Ambler tract than any other witness (Record, 128), but his figures for the vacant lands in the easterly part of the Village were similar to the other witnesses—he said the vacant lands in the easterly part of the Village were equally as valuable as those in the western part thereof (Record, 131).

Euclid Avenue throughout the Village is an 86 foot street, and Chardon and Bliss Roads are 60 foot streets. The smaller streets in the Village are 50 feet wide, except for a few so-called private streets, which are narrower. Ninety per cent. of the streets in the Village of Euclid are 50 feet wide or more (Record, 107 and 123); a large number of the streets in the City of Cleveland are not over 30 feet wide.

We have been obliged to extend this description of the location, development and value of lands in the Village because we are not able to agree with much of the matter set forth in appellant's brief under his heading of "Statement of Facts." We cannot find in the Record, evidence

or admissions sustaining some of the statements in appellant's brief and many other statements are so coupled up with argument of counsel or argument of witnesses, as shown by the Record, that we are unable to accept same as stating the essential facts of the case. We rely upon what we have set forth as indicating the real physical and economic conditions at the time of the adoption of the ordinance and the trial of the case below. The witnesses as to value generally agree that the land between Euclid Avenue and the Nickel Plate railroad is worth two or three times as much or more, if permitted to be developed for business, rather than being limited to residence use and we think they generally agree that the dominating demand for the lands in such part of the Village is for business purposes.

The witness, Robert Whitten, called by the appellant, whose testimony we believe was nearly all irrelevant and almost wholly argumentative, is found beginning on page 109 of the Record, testified as a zoning expert. He admitted (Record, 118, 119) that if the demand on the north side of Euclid was for business and industrial development and the values were as we have pointed them out, then Euclid Avenue would be a very satisfactory dividing line between the residence section to the south and the business and industrial section to the north of Euclid.

With such condition of affairs existing, the Village of Euclid on November 13, 1922, adopted a so-called zoning ordinance, which is found printed in the Record, commencing on page 13. After the filing of plaintiff's bill, this ordinance was amended by the council of the defendant Village before the hearing and entering of the decree below and in describing the ordinance we will consider it as so amended.

THE ORDINANCE.

Ordinance No. 2812 is found in the record beginning at page 13. Its complicated provisions and their application to the property of appellee can be understood only in connection with the so-called zone map referred to in Section 1 of the ordinance, which is found reproduced in the record opposite page 26. An amendment to the ordinance enlarges the territory shown as U 6 on said map in that the strip south of the Nickel Plate Railroad, which is there shown as 500 feet wide, was extended southerly to a line approximately parallel to Euclid Avenue and at an average distance of 750 feet north thereof. The average distance from Euclid Avenue to the Nickel Plate right of way is 1700 feet. In this enlargement some exceptions were made which are not important in this case. Later the map was further changed to establish a new U 3 district 130 feet wide, just south of the enlarged U 6 district. This change in the map is shown in one of the exhibits put in evidence but not printed. It is relatively unimportant in this case.

Before proceeding to a detailed discussion of the ordinance, which seems necessary to an understanding of its provisions, it is well to record that the Village of Euclid was at the time of the passage of this ordinance, and is now, a mere suburb of Cleveland, the major part of its area consisting of acreage property lying along two main line railroads. The recent industrial development of the City of Cleveland, following these railroad lines, has already reached the village and to some extent extends over into the village. In its obvious course, this industrial expansion will soon absorb the area in the village of Euclid for industrial enterprises. It is in restraint of this prospect that the ordinance seeks to operate. In effect it erects a dam to hold back the flood of industrial develop-

ment and thus to preserve a rural character in portions of the village which, under the operation of natural economic laws, would be devoted most profitably to industrial undertakings. This, the evidence shows, destroys value without compensation to the owners of lands who, it is alleged in the bill, have acquired and are holding them for industrial uses.

Since the industrial development of a great city will go on, the effect of this attempted action necessarily is to divert industry to other less suited sites, with a consequent rise in value thereof, so that the loss sustained by the proprietors of land who cannot so use their land is gained by proprietors of land elsewhere. In other words, the property, or value, which is taken away from one set of people, is, by this law, bestowed upon another set of people, imposing an uncompensated loss on the one hand and a gain which is arbitrary and unnatural on the other hand, since it results, not from the operation of economic laws, but from arbitrary considerations of taste enacted into hard and fast legislation. Such legislation also tends to monopolize business and factory sites.

The title of Ordinance 2812 is

> "An Ordinance establishing a zone plan, regulating the location of industries, trades, apartment houses, two family houses, single family houses and other uses of property, the area and dimensions of lots and yards, the bulk and alignment of buildings near street frontages."

By way of preamble, it is recited that the Village of Euclid is a residential suburb of the City of Cleveland, having two steam railroads within its corporate limits and a number of industrial plants therein; that the territory within said Village is available for manufacturing, industry, commercial and residential purposes; that a con-

siderable part of the property therein has been restricted for private residence purposes by the owners thereof and that much of the restricted property has been further limited to single residences; that the street, sewer and water systems of said Village have been designed and constructed to take care of such restricted use and would prove inadequate for more congested use; *that the territory made available by the ordinance for manufacturing, industrial and commercial uses is deemed and found to be sufficient for such purposes; that it is the desire of the citizens of said Village and the council thereof* TO PRESERVE THE PRESENT CHARACTER OF SAID VILLAGE and the public improvements therein, to prevent congestion, and to promote and provide for the health, safety, convenience, comfort, prosperity and general welfare of the citizens thereof, and that for all of these reasons the subject matter of the ordinance constitutes an emergency.

The ordinance is quite unintelligible without the zone map attached to it and made a part of it. Reading the ordinance and the map together it appears that:

> "For the purpose of regulating and restricting the locations of trade, industries, apartment houses, two family houses, single family houses, and other uses of property, the number of square feet of lot area per family house, the width of lots, the location and size of yards and the size and height of buildings, * * * the Village of Euclid"

is divided into three sets of classes; first, a set of six classes of use districts termed respectively U-1 to U-6 inclusive, second, three sets of height districts termed respectively H-1 to H-3 inclusive, and third, four classes of area districts termed respectively A-1 to A-4 inclusive. The area of the Village is thus divided on the map into three different kinds of districts, and it is provided in Section 1

> "No buildings or premises shall be erected or used except in conformity with the regulations herein prescribed for the respective use, height and area district in which such building or premises are located."

An examination of each of these sets of classes discloses the following:

(1) Use Districts.

By Section 1 the use districts are generically defined as follows:

> "Class U 1 or single family house districts, Class U 2 or two family house districts, Class U 3 or apartment house districts, Class U 4 or local retail and wholesale store districts, Class U 5 or commercial districts and Class U 6 or industrial and manufacturing districts."

In Section 2 definitions are given, and there we learn that

> "A 'family' is any number of individuals living and cooking together on the premises as a single housekeeping unit,"

that an apartment house is

> "a building arranged or designed to be occupied by three or more families living independently of each other and doing their own cooking upon the premises or by three or more individuals or groups of individuals living independently but having a common heating system and general dining room."

None of these definitions involve the limitation upon the number of people living together but only require that they shall be bound together by the accident of common cooking. The problems of congestion and sanitation dependent upon numbers all remain.

Further, in Section 2, Sub-section o-2, it is provided that

"A 'single family dwelling' shall consist of a basement containing not less than four hundred square feet and not less than three rooms and a bathroom."

In Sub-section p-1, a two family dwelling is described as

"a detached dwelling arranged, intended or designed to be occupied by two families, one of which has its principal living rooms on the first floor and the other of which has its principal living rooms on the second floor,"

and by Sub-section p-2

"A 'two-family dwelling' shall have a basement containing not less than seven hundred square feet and not less than four living rooms and a bathroom for each family."

It will be noticed that bath rooms must be placed in single and two family dwellings but are not required in apartment houses.

By Section 3 of the Ordinance an enumeration is made of the uses permitted upon each of the several classes of use district property beginning with U-1, and it is to be noted that the restrictions are progressive from the uses described in U-7 which are prohibited as nuisances, up to U-1, covering areas restricted for use by single family residences, that is to say, U-1 is the most restricted territory, in a U-2 district all of the uses permitted in U-1 districts and some additional uses are authorized, in a U-3 district all of the things permitted in U-1 and U-2 districts with some additions are permitted, and so forth.

Class U-1 uses are few in number. In such districts single family dwellings as above defined may be erected, public parks, water towers or reservoirs, and suburban electric railway passenger stations or rights of way may be established. Farming operations may be conducted and *non-commercial* green houses, nurseries and truck garden-

ing. The same uses with the addition of two family dwellings are permitted in U-2 districts. In both such districts the land may not be used to construct an apartment house, no church, school, library or museum may be erected there, no private club or philanthropic institution nor sanitarium, public playground, recreation building, city hall or court house, and their first possibility of existence is in U-3 districts. But even in U-3 districts, where apartment houses, hotels, churches, schools, libraries, museums, private clubs, playgrounds, court houses and city halls may be erected, it is still prohibited to erect any bank building, studio, telephone exchange, fire or police station, restaurant, theatre, retail store, job printing office, sales office or sample room, or wholesale store for hardware, drygoods or groceries. The latter list of prohibited uses may not be indulged in upon any property in areas designated on the map as U-1, U-2 or U-3 and are first tolerated in U-4 districts, which are generically termed local retail or wholesale store districts, but even in U-4 districts owners are prohibited from having stable or shed room for more than five horses or motor trucks, no matter how large their lot area, bill boards or advertising signs are prohibited, being first doubtfully admitted in class U-5 districts, and warehouses for the storage of building materials, contractors' equipment, coal, wood and household goods, no matter how large the lot, or how detached, substantial and fireproof the building may be, are prohibited.

Class U-6 districts are industrial, and in them are permitted penal or correctional institutions, institutions for the insane or feeble-minded, together with sewage disposal plants, garbage incinerators, rag storage, cemeteries and crematories, and manufacturing or industrial operations of any kind with those included in classes U-1 to U-5 inclusive.

U-7 uses correspond to no district, but consist of a number of prohibited uses of a nuisance character not permitted in the Village at all, about which no mention need here be made.

Section 7 of the Ordinance deals with certain accessory uses in residence districts, that is to say, in districts of the U-1, U-2, and U-3 classes. It is provided that an accessory use earlier defined as a use or building customarily incident to and located in the same lot with the use or building, must be pertinent to the class of use, and when so pertinent, will be permitted in the district in which such use is authorized, provided that the accessory use is located upon the same lot with the building or use to which it is accessory. That is to say, one might erect the kind of a garage which is appropriate for a single family dwelling in a U-1 district, but he could not erect in such district a garage appropriate for a two-family dwelling, every accessory use being required to be appropriate to the use in order to be tolerated in the district. But stated accessory use may be only on the same lot with the primary use, so that if a man owned two lots of fifty feet each he could not have his house on one and his garage on the other, as he might do if instead of owning two fifty foot lots he owned one one hundred foot lot. This is made more definite as Section 7 of the Ordinance proceeds. Thus in a U-1 or U-2 district, that is to say, districts in which either single family dwellings or two-family dwellings are permitted, the owners may not have a private garage providing storage for more than one motor vehicle for each 2,000 square feet of the lot area. But if the owner's land happened to be in a U-3 district, in which apartment houses, hotels, private clubs, city halls and court houses are permitted to be built, a private garage may provide storage for one motor vehicle for each 625 square feet of the area of the lot.

No bill board or sign board or advertising sign can be permitted as an accessory use, except only a sign of "for sale" or "for rent," and no sort of store, trade or business, can be regarded as an accessory use except that the office of a physician, dentist or musician may be located in the dwelling or apartment used by the physician, dentist or musician as his private residence, and except further that any person carrying on a customary home occupation may do so in his own house or apartment, provided that no person other than members of his own household are employed to assist him in that occupation, and no window display or sign board is used to advertise such occupation. Further, in a dwelling or apartment occupied as a private residence, while one or more rooms may be rented or table board furnished, still no window display or sign board may be erected to advertise such fact, and only when an owner's property has a U-3 district designation may a public dining room or restaurant be erected or operated on it. A lawyer apparently may practice law in his home, a teacher give language lessions in her apartment, but no sign on the outside of the house must indicate the fact, and if the owner of a house in a U-1 or U-2 district does dressmaking, no outside assistance can be employed, and if rooms are rented or meals furnished, no signs of "lodging to rent" or "board and lodging," however modest the sign, can appear on the premises.

By Section 10 of the Ordinance it is provided

> "in a class U-6 district no building or premises shall be used and no building shall be erected, which is arranged, intended or designed to be used except for a class U-1, U-2, U-3, U-4, U-5 or U-6 use."

That is to say, that all of the kinds of buildings and uses described in addition to those uses specifically provided for a U-6 district. To illustrate, a single family dwelling

(U-1), a two-family (U-2) an apartment house, hotel, city hall or court house (U-3), a bank, restaurant, police station (U-4), an ice manufacturing plant, laundry, blacksmithing shop (U-5), may all be located in a U-6 district, together with industrial establishments, but the same aggregation of miscellaneous and heterogeneous uses may not be had in a U-1 district. The public safety, health and welfare are just as much offended by a family next to a laundry in one place as another. The private interests of some residence property owners, however, may be strengthened by separation. How can it be said that this Ordinance is addressed to any of the well-known objects of the police power under such circumstances, for the Ordinance does not attempt to protect residences from the proximity of industrial undertakings, but only to protect certain sections of land from being occupied by both uses. This section conclusively shows that the Ordinance is not designed to protect the health, safety and comfort of the public. If it were, then the theory which excludes industrial undertakings from U-1 districts would exclude single family residences from U-6 districts.

Height Districts.

From the point of view of height the Village is divided into three kinds of districts, H-1, H-2 and H-3, as to which the restrictions are for class H-1 that no building shall be erected to a height in excess of two and one-half stories or 35 feet, except that a church, school or library may go to a height of four stories not in excess of 50 feet. In a class H-2 district the maximum permitted height is four stories not to exceed 50 feet, and in a class H-3 district a maximum of 80 feet is provided for all classes of buildings including those designed for residence purposes.

Area Districts.

From the point of view of area the Village is divided into four classes of districts, termed respectively A-1, A-2, A-3 and A-4. In a class A-1 district no dwelling or apartment house can be erected or altered to accommodate or make provision for more than one family for each 5,000 square feet of the area of the lot if an interior lot, or for each 4,000 square feet if a corner lot. In a class A-2 district the restrictions limit the area of a dwelling or apartment house to a minimum of one family for each 2,500 square feet of lot area if an interior lot or 2,000 square feet if a corner lot. In a class A-3 district the limitations require a minimum of 1,250 square feet of lot area per family if an interior lot or 1,000 square feet if a corner lot. In a class A-4 district no dwelling or apartment house can be erected or altered to accommodate or make provision for more than one family for each 900 square feet of the area of the lot if an interior lot or for each 700 square feet if a corner lot. Manifestly, if the health, safety and comfort of a family require 5,000 square feet of lot area in one part of the Village of Euclid they require it in all parts of the Village. Conversely, if the health, safety and comfort of a family are adequately provided for by a minimum of 700 square feet of lot area in any part of the Village of Euclid, the same minimum will serve the same purpose in every part of the Village. A family living in an A-1 district on 5,000 square feet of land will be obviously more prosperously environed than a family living in an A-2 district on 2,500 square feet of land, and an A-2 family will have a superior economic ostentation over an A-3 family living on 1,250 square feet of land. The A-3 family in like measure will be able to look down upon the A-4 family, who have only 900 square feet of area, and the arrangement thus made will body

forth an aesthetic prosperity in an ascending scale so that the wayfarer will know when he finally reached the A-1 inhabitants of the Village. But these considerations, however pleasing to the local pride of the officials of the Village, are not objectives for which the police power can be used. When the Village authorities have provided the minimum lot area which pure air, fire protection and disease control demand, they have exhausted the police power; further restrictions upon the use of private property by way of requiring certain areas per family are rights of ownership and not of regulation, and the public authorities may not under the guise of regulation exercise the rights of ownership.

By Section 17 of the Ordinance it is provided that in the class U-1, U-2 and U-3 districts no dwelling shall be erected on a lot having an average width of less than 40 feet, and in a class 2 district no double or two family house shall be erected on a lot having an average width of less than 45 feet. Single family dwellings and two family dwellings can therefore be erected in class U-4, U-5 and U-6 districts on lots narrower than 40 feet. That is to say, in a U-1 district where there are nothing but private dwellings, each of which has a minimum of 5,000 square feet of lot area, a private dwelling may not be erected on a lot narrower than 40 feet, but in a class U-4 district a private dwelling may be erected on a lot of any width in the midst of banks, restaurants, theatres, motion picture shows, retail stores, gasoline stations, skating rinks and dance halls.

Section 19 of the Ordinance deals with rear yards in residence districts. We pause to note only one of the restrictions which has to do with accessory buildings. An accessory building is one customarily incident to and located on the same lot with another use or building, but no such building may occupy more than 40% of the yard

or be more than 24 feet in height, and no such building, if detached from the main building, may be erected within 20 feet of any street line or within 10 feet of the rear lot line.

In Section 20 of the Ordinance dealing with side and rear yards in business districts a similar restriction is imposed.

By Section 22 of the Ordinance an attempt is made to regulate building lines and front yards, and it is there said that

> "for the purpose of regulating the alignment of buildings near street frontages, building lines are set forth on the building map which accompanies this Ordinance and which lines hereby are declared to be a part thereof and hereof and are hereby established."

There then follows a series of set back restrictions which are highly complicated and in a measure dependent upon the depths of the lots, as for instance

> "on a street frontage on either side of a street between two intersecting streets, but excluding the frontage along the side line of a corner lot, the distance of the building line, back from the street line, shall be 20 per cent of the average or normal depth of the lots having their front lines along such street frontage, but such distance back from the street line need not be more than 40 feet."

Similar side line restrictions are imposed.

By Section 22 of the ordinance various set back building lines are established. On Euclid Avenue, a street 86 feet wide, the set back in the residence territory is 50 feet. See also legend on zoning map.

By Section 23 of the ordinance there is established a "Board of Zoning Appeals" with powers as follows:

> "Any decision of the Inspector of Buildings made in the enforcement of this ordinance, may be appealed to The Board of Zoning Appeals, by any

person claiming to be adversely affected by such decisions. Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this Ordinance, The Board of Zoning Appeals shall have power, in a specific case, to interpret any such provision in harmony with the general purpose and intent of this Ordinance so that the public health, safety and general welfare may be secured and so that substantial justice may be done."

Said ordinance in Section 25 thereof attempts, by its terms, to limit, restrict and control, the powers of the council and subsequently elected councils, in making amendments to the ordinance, as follows: It is provided that the council may amend the regulations and districts only after any proposed amendment shall have been referred to the City Planning and Zoning Commission for report, and that if such proposed amendment shall not have received the approval of said Zoning Commission the council shall not pass it except by a three-fourths vote; that if the owners of twenty per cent of the land within the area proposed to be altered shall protest, council shall not pass the amendment except by a three-fourths vote; that if a proposed amendment would transfer an area to a district having a less restricted use and a protest is presented by the owners of twenty per cent of the land adjacent to and "within two hundred feet from such area proposed to be transferred and within a more restricted use district than the district in which such area is proposed to be transferred such amendment shall not be passed except by a three-fourths vote of the council."

The only means offered by said ordinance to appellee to secure relief from or relaxation of the aforesaid restrictions and limitations upon the use of its lands is a provision in Section 25 that "whenever the owners of fifty per cent of the land in any area shall present a

petition duly signed and acknowledged to the council, requesting an amendment of the regulations prescribed for such area; it shall be the duty of the council to vote upon such amendment within ninety days of the filing of same by the petitioners."

In addition to the restrictions imposed by said ordinance upon the otherwise lawful use of appellee's lands, the ordinance imposes upon the owner of "any building or premises or part thereof where anything in violation of the ordinance shall be placed or shall exist or be maintained" a fine of not more than five hundred dollars, and it is provided that each day during which such violation shall continue shall constitute a separate offense.

EFFECT OF ORDINANCE ON LAND OF APPELLEE.

The sixty-eight acres of land belonging to the appellee indicated on the zoning map opposite page 26 of the record in red were zoned by Ordinance 2812 as follows:

The northerly 500 feet thereof immediately adjacent to the right of way of the New York, Chicago & St. Louis Railroad Company under the original ordinance was classed as U-6 territory and the rest thereof as U-2 territory. By amendments to the ordinance a strip 630 feet wide north of Euclid Avenue is classed as U-2 territory, a strip 130 feet wide next north as U-3 territory and the rest of the parcel to the Nickel Plate right of way as U-6 territory. That is to say, upon the appellee's land next to Euclid Avenue and for a distance of 630 feet, no building may be erected or used except for a one or two family dwelling; upon the next 130 feet buildings may be erected for apartment house, hotel, church, school and other uses provided in class U-3; northerly from this last mentioned strip for a depth of about 1000 feet to the right of way of the railroad, permitted industrial uses are authorized.

APPLICABLE CONSTITUTIONAL PROVISIONS.

CONSTITUTION OF THE UNITED STATES, AMENDMENTS.

ARTICLE V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*.

ARTICLE XIV,

Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

CONSTITUTION OF OHIO.

ARTICLE I,

Section 1:

"All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety."

Section 2:

"All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the General Assembly."

Section 19:

"*Private property shall ever be held inviolate but subservient to the public welfare.* When taken in time of war, or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, *and in all other cases where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury without deduction for benefit to any property of the owner.*"

Section 20:

"This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated, remain with the people."

ARTICLE XVIII,

Section 3:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

ISSUES PRESENTED.

The foregoing facts and proceedings present to the Court for decision this issue of law:

> **Is Ordinance No. 2812 of the Village of Euclid a Valid Ordinance, as it Affects the Property of the Appellee, or is it Invalid in that it Violates the Protections Afforded by the Constitutions of the United States and Ohio to the Right of Property in the Appellee by Attempted Regulations under the Guise of the Police Power, which are Unreasonable and Confiscatory.**

Before proceeding to discuss this main issue we dispose of two other questions, (I) the timeliness of the application for relief, and (II), the extent and source of the legislative power of the Village of Euclid.

I.

THE TIMELINESS OF THE APPLICATION FOR RELIEF.

In the District Court, a motion to dismiss was filed, argued and overruled. (Rec. p. 27). The defendant then filed an answer and the case was matured for final hearing, heard and decided.

In the bill of complaint, the plaintiff alleged that it had acquired and held its sixty-eight acres of land in the defendant village for the purpose of selling it for industrial development; that Ordinance No. 2812 purported so to limit, restrict and control the lawful uses of said lands as to confiscate and destroy a great part of the value thereof; that the defendant village and the defendant Inspector of Buildings were enforcing said ordinance in accordance with its literal terms; that prospective buyers of land for industrial, commercial and residence uses in the metropolitan district of Cleveland were being deterred from buying

any part of this plaintiff's lands by the existence of said ordinance, being unwilling to consider land as to which it would be necessary for them to conduct burdensome and expensive litigation in order to vindicate their right to subject it to lawful and legitimate uses, and that so long as said ordinance remained in apparent force and effect, it would constitute a cloud upon the lands of the plaintiff, reduce and destroy their value and divert the normal industrial, commercial and residence development thereof to other and less favored locations, as to which no such illegal, oppressive and confiscatory limitations and restrictions had been attempted to be imposed. (Rec. p. 10.)

In the answer of defendant below, the defendant village denied these allegations and contended that property owners in the village had, in the zoning ordinance itself, remedies by way of appeal to the Board of Zoning Appeals and agitations for amendments to the ordinance, which ought to be exhausted before any right of action arose. (Rec. p. 38.) In the argument below it was alleged, as it is here, that the Ambler Realty Company could have no matured right of action until it had first made application for a permit as to specific proposed uses of its lands, taken appeals from refusals to grant such permit and filed petition with council of the village for such amendments as it might deem necessary.

The trial court in the final decree found the facts alleged by the plaintiff in its bill to be true. (Rec. p. 62). In the opinion of the court (297 Fed. Rep. 309, Rec. p. 53) the court specifically found with regard to this question:

> "The evidence clearly shows that the normal and reasonably to be expected use and development of plaintiff's land along Euclid Avenue is for general trade and commercial purposes, particularly retail stores and like mercantile establishments; and that the normal and reasonably to be expected use of the

residue, including the restricted area, is for industrial and trade purposes. The evidence also clearly shows that the restrictive provisions of the ordinance in question impair the salability of this land and depress its market value to the extent of several hundred thousand dollars. The restrictions, if sustained, the evidence further shows will prevent the normal and reasonably to be expected increased value due to the availability of this land for trade, industrial and commercial purposes."

Proceeding upon this finding of facts, the District Court held that there could be no doubt as to the jurisdiction of a court of equity to grant relief if the ordinance were, in fact, void. The court says:

> "It was enacted under color of authority and is apparently valid. While it is outstanding it creates a substantial cloud upon plaintiff's title and the only adequate relief is a decree ascertaining and declaring its invalidity and cancelling the cloud."

We respectfully submit that the trial court correctly stated the power and duty of a court of equity in such a situation.

The wrong done to the plaintiff below was done when the ordinance was passed and continues as long as the ordinance is in existence. Prospective purchasers of land for commercial and industrial development will not even consider the plaintiff's land so long as the ordinance is in existence. To require the plaintiff to wait until he can find a purchaser sufficiently brave and sufficiently patient to buy a site in the teeth of this ordinance, bear the cost and delay of preparing plans, applying for a permit and having it rejected, perfecting an appeal and having it denied, and then exhausting the possibilities of petitions for amendment of the ordinance, which would permit the proposed use, would, in fact, deprive the plaintiff of any rem-

edy whatever, for no such complaisant purchasers can be found in a competitive real estate market. The plaintiff and others similarly situated with regard to their lands would simply be required to sit still and see the normal industrial and commercial development diverted, as purchasers passed them by and took less desirable land, free from the necessities of protracted litigation, in preference to the lands in the Village of Euclid, each acre of which would require litigation and lobbying before it could be devoted to entirely lawful and normal uses.

Ordinance No. 2812 is penal in character. That a court of equity will enjoin the enforcement of a void statute where the legal remedy is inadequate is no longer open to question, in view of the decisions of this Court.

In *Kennington vs. Palmer,* 255 U. S. 100, it is said in the syllabus:

> "Equity will enjoin criminal prosecutions threatened in a void statute, the legal remedy being inadequate."

To the same effect was the decision and holding in *U. S. vs. Schwartz* and *U. S. vs. Smith,* 255 U. S. 102. A similar exercise of the power of a court of equity was exhibited in *Adams vs. Tanner,* 244 U. S. 590, where a law of the State of Washington forbidding employment agents from receiving fees from the workers for whom they found places of employment was held void and its enforcement prohibited. The same principle is clearly announced by this Court in *Truax vs. Raich,* 239 U. S. 33. See also *Bloch vs. Hirsch,* 256 U. S. 135; *Brown Holding Co. vs. Feldman,* 256 U. S. 170.

Both on principle and authority the power of a court of equity in such situations is clear. Where there is no adequate remedy at law, the court will not force a complainant to stand idly by and see the value of his property

diminished or transferred to others, by the illegal action of a municipal corporation, but will enjoin the enforcement of the invalid ordinance and so prevent the continuing wrong of its presence on the statute books and the menace which it presents to the plaintiff's rights and to those who buy from the plaintiff. As a matter of fact, the plaintiff in the court below has high prerogative rights which can find no adequate protection except in a court of equity. If I own land and some one commits a trespass upon it, an action at law makes me whole. The case is different, however, if while I own land, some authority, clothed with the power to make laws, promulgates, with regard to my ownership, unconstitutional restrictions and limitations and writes into a statute book that while I may continue to hold the legal title, I may not, either for myself or my grantees, enjoy the full benefit of the land. In such a case if the lawmaking power goes beyond its constitutional license and violates the rights guaranteed to me as a land owner by the Constitution of the United States, then a court of equity alone can make me whole and restrain the wrong which, being done under color of law, commands respect and obedience until the judicial voice is interposed to quiet my right of enjoyment and establish my right to the legitimate use of my property.

II.

THE EXTENT AND SOURCE OF THE LEGISLATIVE POWER OF THE VILLAGE OF EUCLID.

The so-called zoning ordinance and the amendments thereto are attempts by the legislature to exercise the so-called police power. A brief reference to the power of Ohio municipalities is, therefore, justified.

By the Eighteenth Amendment to the Constitution of Ohio, adopted September 12, 1912, municipal corporations are recognized, classified and directly endowed with power. This amendment is known in Ohio as the Home Rule Amendment and the power given by it is specified and placed beyond the power of the General Assembly either to enlarge or diminish except to the extent that the constitutional amendment itself authorizes control by general statute. Control of this kind is limited to three particulars:

(1) Limitations upon taxation and debts.

(2) Provision for examination of municipal books of account by a state bureau.

(3) Certain general laws authorized to be passed providing methods of incorporation and modes of government to apply to municipal corporations which do not elect to enact their own charters.

Except for the limitations above indicated, municipal corporations in Ohio draw their power directly from the constitution, and while the legislature retains power by statute to deal with subjects of general and common interest to all municipalities, and to direct mutual agencies in their cooperation with one another in furtherance of state wide and county objects, it is nevertheless true that all the "power of local self-government" is given to municipal corporations directly by Section 3 of Article XVIII of the Ohio Constitution, as quoted above, and no enabling legis-

lation by the state legislature is necessary or appropriate on the subject.

In 1915 the Legislature of Ohio enacted a statute authorizing the councils of municipalities to establish planning commissions and later in 1919 amended the act so as to authorize zoning. This act and the amendment thereto are printed in the margin as General Code, Sections 4366-1 to 4366-12. The zoning sections added by the amendment of 1919 comprise sub-sections -7 to -12 of the act, and they purport to authorize city planning commissions to divide municipalities into zones or districts, based upon three classes of considerations:

(1) The use of buildings and other structures;

(2) The heights of buildings;

(3) Bulk, location and percentage of occupancy.

In view of the existence of this constitutional provision and this enactment of the Legislature, some confusion might arise as to the source and extent of the power of the Village of Euclid. The Supreme Court of Ohio has, however, set all question at rest on this subject. In the *Village of Perrysburg vs. Ridgway*, 108 O. S. 245, it is held:

> "Since the Constitution of 1912 became operative, all municipalities derive all their powers of local self-government from the Constitution direct, by virtue of Article III, Section 18 thereof. * * *
>
> "The above constitutional grant of power to municipalities is 'self-executing' in the sense that no legislative action is necessary in order to make it available to the municipality."

This case was brought to test the validity of an ordinance of the Village of Perrysburg, passed to regulate the operation of motor busses within the municipal limits. The ordinance was held to be a police regulation within the

power of local self-government and therefore to rest upon the constitutional donation of power.

This question is not important in this case since the appellee denied below the power of the Legislature of Ohio or of the Village of Euclid. Whether Ordinance No. 2812 rests for its authority upon the "power of local self-government" granted by Section 3 of Article XVIII of the Constitution, or upon the attempted donation of power to municipal corporations by Sections 4366-1 to 4366-12 of the General Code, the same tests must be applied to its validity, and those tests are whether or not that ordinance is a reasonable and real exercise of the police power or an unreasonable and arbitrary exercise of the legitimate powers of local self-government and an impairment of the rights of property guaranteed to the appellee below by the Constitutions of the United States and of Ohio.

OHIO GENERAL CODE.

CITY PLANNING COMMISSION.

SEC. 4366-1. The council of each municipality may establish a city planning commission, consisting of seven members, the mayor, the service director, the president of the board of park commissioners, and four citizens of the municipality, who shall serve without compensation, and who shall be appointed by the mayor for term of six years, except that the term of two of the members of the first commission shall be for three years. Whenever such a commission is appointed, it shall have all the powers conferred in Sec. 4344 of the General Code.

SEC. 4366-2. The powers and duties of the commission shall be to make plans and maps of the whole or any portion of such municipality, and of any land outside of the municipality, which in the opinion of the commission bears relation to the planning of the municipality, and to make changes in such plans or maps when it deems same advisable. Such maps or plans shall show the commission's recommendations for new streets, alleys, ways, viaducts, bridges, subways, parkways, parks, playgrounds, or any other public grounds or public improvements; and the removal, relocation, widening or extension of such public works then existing. With a view to the systematic planning of municipalities, the commission may make recommendations to the mayor, council and department heads concerning the location of streets, transportation and communication facilities, public buildings and grounds. The commission shall have the power to control, preserve and care for historical land marks; to control in the manner provided by ordinance the design and location of statuary and other works of art, which are or may become the property of the municipality; and the removal, relocation and alteration of any such works belonging to the municipality; and the design of harbors, bridges, viaducts, street fixtures and other public structures and appurtenances. Whenever the commission shall have made a plan of the municipality,

THE MAIN QUESTION.

As stated above, the real question in this case is whether Ordinance No. 2812 of the Village of Euclid, as amended, is a valid police regulation of the property of the appellee in the village.

The trial court held, 297 Fed. 309 that:

> "The evidence clearly shows that the normal and reasonably to be expected use and development of the plaintiff's land along Euclid Avenue is for general trade and commercial purposes, particularly retail stores and like mercantile establishments; and that the normal and reasonably to be expected use of the residue, including the restricted area, is for industrial

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or any portion thereof, no public building, street, boulevard, parkway, park, playground, public ground, canal, river front, harbor, dock, wharf, bridge, viaduct, tunnel, utility (whether publicly or privately owned) or part thereof shall be constructed or authorized to be constructed in the municipality of said planned portion of the municipality until and unless the location thereof shall be approved by the commission; provided that in case of disapproval the commission shall communicate its reasons for disapproval to council, and the department head of the department which has control of the construction of the proposed improvement or utility; and council, by a vote of not less than two-thirds of its members and such department head shall together have the power to overrule such disapproval. The narrowing, ornamentation, vacation or change in the use of streets and other public ways, grounds and places shall be subject to similar approval, and disapproval may be similarly overruled. The commission may make recommendations to any public authorities or to any corporations or individuals in such municipality or the territory contiguous thereto, concerning the location of any buildings, structures or works to be erected or constructed by them.

SEC. 4366-3. The municipal planning commission shall be the platting commission of the municipality, and all the powers and duties provided by law for platting commissioner or commissioners of municipalities shall upon the appointment of a municipal planning commission under this act, be deemed transferred to such commission.

SEC. 4366-4. Council may authorize the commission to control the height, design and location of buildings.

SEC. 4366-5. The commission shall have power to control, appoint or employ such architects, engineer and other professional service, and to appoint such clerks, draughtsmen and other subordinates as it shall deem necessary for the performance of its functions; the expenditures for such service and employments to be within the amounts appropriated for such persons by the council of the municipality; and council shall provide for the expenses and accommodations necessary for the work of the commission.

SEC. 4366-6. This act shall take effect and be in force January 1, 1916.

SEC. 4366-7. The city planning commission of any municipality shall have the power to frame and adopt a plan or plans for dividing the munici-

and trade uses. The evidence also clearly shows that the restrictive provisions of the ordinance in question impair the salability of this land and depress its present market value to the extent of several hundred thousand dollars. The restrictions, if sustained, the evidence further shows, will prevent the normal and reasonably to be expected increased value due to the availability of this land for trade, industrial and commercial purposes."

Assuming these facts, which we believe to be conclusively established by the evidence, the question is: Has the Village of Euclid the power to impose this damage upon the appellee? Primarily the Court's attention must be

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pality or any portion thereof into zones or districts, representing the recommendations of the commission, in the interest of the public health, safety, convenience, comfort, prosperity or general welfare, for the limitations and regulation of the height, the bulk and location (including percentage of lot occupancy, set back building lines, and area and dimensions of yards, courts and other open spaces), and the uses of buildings and other structures and of premises in such zones or districts. The council of any village is hereby empowered to create and appoint a planning commission with the powers set forth in this act (G. C. §§ 4366-7 to 4366-12).

SEC. 4366-8. Whenever the city planning commission of any municipality or any board or officer with city planning powers, whether such commission, board or officer is created under state statute or municipal charter, or the planning commission of any village appointed under the provisions of section 4366-7, certifies to the council or other legislative body of the municipality any such plan for the districting or zoning of the municipality according to the uses of buildings and other structures and of premises, then said council or other legislative body, in the interest of the promotion of public health, safety, convenience, comfort, prosperity or general welfare, may regulate and restrict the location of buildings and other structures and of premises to be used for trade, industry, residence or other specified uses, and for said purposes divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this section. For each of such districts regulations may be imposed designating the kinds or classes of trades, industries, residences or other purposes for which buildings or other structures or premises may be permitted to be erected, altered or used subject to special regulations.

SEC. 4366-9. Whenever any such planning commission, board or officer certifies to such council or other legislative body any such plan for the districting or zoning of the municipality according to the height of buildings and other structures, then such council or other legislative body, in the interest of the promotion of the public health, safety, convenience, comfort, prosperity or general welfare, may regulate and limit the height of buildings and other structures thereafter erected or altered and for said purpose divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this section. Any such regulation

directed to the restrictions sought to be imposed by the ordinance upon the land of the appellee. Since, however, it is claimed by the appellant that Ordinance No. 2812 is a comprehensive piece of legislation and that the damage suffered by the appellee is merely the incidental result of a large scheme enacted in the general public welfare, it is necessary for the Court to consider No. 2812 generally.

When this is done, we believe that it will be found that the ordinance does not, in fact, pursue any rational plan, dictated by considerations of public safety, health and welfare upon which the police power rests. On the contrary it will appear that the ordinance is an arbitrary

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imposing a lower height limitation than may be provided by state statute shall, within the district for which it is imposed, prevail over the said limitation provided by state statute.

SEC. 4366-10. Whenever any such planning commission, board or officer certifies to such council or other legislative body any such plan for the districting or zoning of the municipality according to the bulk and location of buildings and other structures (including percentage of lot occupancy, set back building lines, and area of yards, courts and other open spaces), then such council or other legislative body may, in the interest of the promotion of the public health, safety, convenience, comfort, prosperity or general welfare, regulate the bulk and location of buildings and other structures thereafter erected or altered, the percentage of lot occupancy, set back building lines and the area of yards, courts and other open spaces and for said purposes may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this section. Any such regulation imposing a less percentage of lot occupancy, wider or larger courts, deeper yards or other more strict limitations than those provided by state statute shall within the district for which it is imposed, prevail over the said limitations provided by state statute.

SEC. 4366-11. The districting or zoning of any municipality or part thereof may be based upon any combination of two or more of the purposes described in the foregoing three sections. In the determination and establishment of districts as above provided, buildings and other structures may be classified on the basis of the nature or character of trade, industry, profession or other activity conducted or to be conducted therein, the number of persons, families or other group units to reside in or use them, the public, quasi-public or private nature of the use thereof, or upon any other basis or bases relevant to the promotion of the public safety, health, morals, convenience, prosperity or welfare. The council or other legislative body may, from time to time, amend or change the number, shape, area or regulations of or within any district or districts; but no such amendment or change shall become effective unless the ordinance proposing such amendment or change shall first be submitted to the planning commission, board or officer for approval, disapproval or suggestions and the planning commission, board or officer shall have been allowed a reasonable time, not less than thirty days, for consideration and report. The council or other legislative body may create

attempt to prevent the natural and proper development of the land in the village prejudicial to the public welfare, in that it prohibits the business and industry of the metropolitan district of Cleveland from access to land economically most available. By so doing it imposes upon the general welfare the burden of having the business and industry of the Village of Euclid and of the City of Cleveland diverted to less favorable and less available lands in order to maintain a rural character for certain residence property. This property in the interest of the public welfare, should be devoted to those industrial uses for which it is needed and most appropriate.

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an administrative board to administer the details of the application of the regulations and may delegate to such board, in accordance with general rules and regulations to be set forth in the districting ordinances and regulations, the power to hear and determine appeals from refusal of building permits by building commissioners or other officers, to permit exceptions to and variations from the district regulations in the classes of cases or situations specified in the regulations and to administer the regulations as specified therein; or these administrative powers and functions may be delegated by the council or other legislative body to the planning commission or board. Before any ordinance, measure or regulation authorized by this and the three foregoing sections may be passed, the council or other legislative body shall hold a public hearing thereon, and shall give thirty days' notice of the time and place thereof in a newspaper of general circulation in the municipality; and during said thirty days the text or copy of the text of such ordinance, measure or regulation, together with the maps or plans or copies thereof forming part of or referred to in said ordinance, measure or regulation and the maps, plans, and reports submitted by the planning commission, board or officer shall be on file, for public examination, in the office of the clerk of the council or other legislative body or in such other office as may be designated by the council or other legislative body. No such ordinance, measure or regulation which violates, differs from or departs from the plan or report submitted by the planning commission, board or officer shall take effect unless passed or approved by not less than three-fourths of the full membership of the council or other legislative body.

SEC. 4366-12. Nothing contained in the foregoing sections 4366-7 to 4366-11 inclusive shall be deemed to repeal, reduce or modify any power granted by law or charter to any municipality, council or other legislative body of a municipality nor to impair or restrict the power of any municipality under Article XVIII of the Constitution of Ohio.

Should any section or provision of this act be decided by the courts to be unconstitutional or invalid, the same shall not affect the validity of the act as a whole or any part thereof other than the part so decided to be unconstitutional.

Nothing herein shall be construed as authorizing a municipality to reserve the use of any private property for future public use for the purpose of extending or widening streets.

Therefore, while it will be necessary for us to discuss "zoning" and point out what we believe to be the point of collision between the so-called zoning power and the Constitution of the United States, the appellee's primary interest is to protect its property against the damage wrought by this particular ordinance.

That municipalities have power to regulate the height of buildings, area of occupation, strengths of building materials, modes of construction and density of use, in the interest of the public safety, health, morals and welfare, are propositions long since established; that a rational use of this power may be made by dividing a municipality into districts or zones, and varying the requirements according to the characteristics of the districts, is, of course, equally well established. We believe it, however, to be the law that these powers must be reasonably exercised, and that a municipality may not, under the guise of the police power, arbitrarily divert property from its appropriate and most economical uses or diminish its value by imposing restrictions which have no other basis than the momentary taste of the public authorities. Nor can police regulations be used to effect the arbitrary desire to have a municipality resist the operation of economic laws and remain rural, exclusive and aesthetic, when its land is needed to be otherwise developed by that larger public good and public welfare, which takes into consideration the extent to which the prosperity of the country depends upon the economic development of its business and industrial enterprises.

The municipal limits of the Village of Euclid are, after all, arbitrary and accidental political lines. The metropolitan city of Cleveland is one of the great industrial centers of the United States. If the Village of Euclid may lawfully prefer to remain rural and restrict the nor-

mal industrial and business development of its land, each of the other municipalities, circumadjacent to the City of Cleveland, may pursue a like course. Thus the areas available for the expanding industrial needs of the metropolitan city will be restricted, the value of such land as is left available artificially enhanced and industry driven to less advantageous sites. All this would be done at the expense of those land owners whose lands, being most advantageously located from an industrial point of view, have as a part of their right of property, which the Constitutions of the Nation and the States undertake to protect, the expectation of value due to their superior availability for industrial development.

The Supreme Court of Ohio in *Kahn Bros. vs. Youngstown,* 113 O. S. 17 and *Pritz vs. Messer,* 113 O. S. 89, cases which it will be necessary to refer to more at large, has considered both of these questions. In *Pritz vs. Messer,* paragraph 1 of the syllabus, it is said:

> "Laws enacted in the *proper* exercise of the police power *which are reasonably necessary for the preservation of the public health, safety and morals,* even though they result in the impairment of the full use of property by the owner thereof, do not constitute a 'taking of private property' within the meaning of the constitutional requirements as to making compensation for the taking of property for public use and as to the deprivation of property without due process of law." (Italics supplied.)

A reading of this case will sustain the view above expressed that the name "police power" may not be made a cloak for an unreasonable invasion of the right of private property.

In *Kahn Bros. vs. Youngstown* the Supreme Court of Ohio held an ordinance invalid which established only a fraction of the territory of a municipality into a district

and prohibited the erection therein of any building to be used as a dwelling, except single or two-family dwellings. The grounds of the decision were two-fold, first, that the record showed the district in question "a most healthful part of the municipality in which to erect an apartment house" and that "the public health, morals and safety of the district and of the entire municipality will not be impaired by the erection of such an apartment house"; hence the prohibition of the apartment house, therein, constituted a taking of property without due process of law and second, it was held by the court that a mere district ordinance differed from a comprehensive ordinance since it did not take into view or serve the public welfare of the whole population of the municipality. From any point of view, except one limited to the imaginary and accidental lines which bound the Village of Euclid, the village is but a district of the City of Cleveland. The public affected by the regulations which it enacts is the whole public of the metropolitan area of which it is a part. If the Village of Euclid is to be accorded the right adversely to affect the welfare of the metropolitan district by its restrictive regulations and the same right goes to all the other villages which surround Cleveland, it could, by the same logic, be accorded to the various wards in the City of Cleveland and we would thus have the business and industrial life of the great metropolitan area throttled by innumerable competitive local regulations, none of which are based upon considerations of the general, as distinguished from the very local, and partial public welfare.

ARGUMENT.

In the opinion of the court below it is said, 297 Fed. 314:

> "Obviously the 'police power' is not susceptible of exact definition. It would be difficult, even if it were not unwise, to attempt a more exact definition than has been given. And yet there is a wide difference between the power of eminent domain and the police power; and it is not true that the public welfare is a justification for the taking of private property for the general good. The broad language found in the books must be considered always in view of the facts, and when that is done the difficulty disappears. A law or ordinance passed under the guise of the police power, which invades private property as above defined, can be sustained only when it has a real and substantial relation to the maintenance and preservation of the public peace, public order, public morals or public safety. The courts never hesitate to look through the false pretense to the substantial."

The distinction drawn in the foregoing between the power of eminent domain and the police power is important. The most complete and perfect private title to property, is, under our constitutional system, subject to this limitation,—that in case of necessity it may be taken for the public good and no private or sentimental consideration on the part of the private owner will be permitted to halt or obstruct that progressive development upon which the general welfare of society depends. But this power of society to take property from the individual *in invitum* is strictly safeguarded by Federal and state constitutions generally.

In the first place, there must be a public need, the property proposed to be taken must be taken for a public use, all the forms of law must be observed in the taking and the private owner ultimately compensated. The courts do not allow the private owner to argue with the

legislative authority in the exercise of its discretion as to what is a public need and his opinion is not important in the definitions of a public use, but the books are full of cases in which the exercise of this power has been stayed, even against the legislative determination, where the proposed use was only colorably public and the plain purpose of the appropriation was private advantage, no matter how widely distributed. Even where the owner is to be fully compensated, his right to retain and use his own property is protected unless there is a real, as against a pretended, public need to take it and use it.

Quite different is the police power under which the ordinance in this case purports to be passed. In every ordered society the state must act as umpire to the extent of preventing one man from so using his property or rights as to prevent another or others from making a correspondingly full and free use of their property and rights. The abstract right of a man to build a fire trap is limited by the rights of other people not to have their houses subjected to the peril created by it. The right of a man to maintain a nuisance on his own property is limited by the rights of others not to be subjected to the danger of its proximity. Accordingly, the so-called police power is an inherent right on the part of the public umpire to prevent misuses of property or rights which impair the health, safety or morals of others, or affect prejudicially the general public welfare.

The limitations imposed by the police power do not have to be compensated for, for the reason that they are inherent in the ownership. If I buy a piece of land I have no means of knowing whether or not it will be needed for the public use, and if any need develops, I must be compensated when the public takes it. But I always know when I buy land, that I may not devote it to uses which endanger the safety, health or morals of others or make

its use a common nuisance to the prejudice of the public welfare. Because of its nature, the exercise of the police power has always been restrained to those uses of property which invade the *rights* of others, and courts consistently decline to permit an extension of the police power to uses of property involving mere questions of taste or preference or financial advantage to others. The public welfare, for which the police power may be exercised, which views merely the desire of a part of the people in a municipality to maintain a rural character for their residences by forbidding other land owners to devote their nearby lands to legitimate and inoffensive business uses, is not wide enough. Unless the theory of our expanding civilization is wrong, the public welfare is advanced by the devotion of the most available sites to business and industry, as the need for them develops.

Under our constitutional guaranties, and in accordance with our legal traditions, owners of property have been protected in the completeness of their ownership except as the public need was asserted through the right of eminent domain, and the public safety asserted through the police power. Restrictions upon limited areas have always been established, when desired, by mutual contracts, and such restrictions have been upheld so long as they were reasonable, in view of the changing relation of the land to which they applied to the general growth and development of the country. It has, however, only recently been suggested that use restrictions, which formerly lay in contract, may be imposed or abrogated by municipal regulation and that the fleeting legislative judgment and will of a municipal council can select which, out of a variety of admittedly innocent uses, it will permit the owners of land to enjoy.

Yates vs. Milwaukee, 10 Wall. 497, 505.

We believe it to be the law that regulations sought to be imposed by laws or ordinances must have a real and substantial bearing upon the public health, public safety, public morals or general public welfare, and that a belief, no matter how fervently or widely entertained, that municipal authorities can assert some sort of communal control over privately owned land is at variance with the fundamental nature of private ownership and in derogation of that protection of private ownership, for which the applicable provisions of bills of rights and constitutions were made among us.

Even if the world could agree by unanimous consent upon what is beautiful and desirable, it could not, under our constitutional theory, enforce its decision by prohibiting a land owner, who refuses to accept the world's view of beauty, from making otherwise safe and innocent uses of his land. The case against many of these zoning laws, however, is much stronger than this. The world has not reached a unanimous judgment about beauty, and there are few unlikelier places to look for stable judgments on such subjects than in the changing discretion of legislative bodies, moved this way and that by the conflict of commercial interests on the one hand, and the assorted opinions of individuals, moved by purely private concerns, on the other. We respectfully submit that counsel for appellant, in his fervor for an extension of the police power which will permit municipalities to accomplish all the great goods at which zoning aims, overlooks the fact that, after all, this is merely a desire of some people to tell other people how to use their property.

Perhaps the most often quoted definition of the police power is that of Judge Cooley:

> "The police power embraces the whole system of internal regulation by which the state seeks not only

to preserve public order and to prevent offenses against the state, but also to establish, for the intercourse of citizens with citizens, those rules of good manners and good neighborhood which are calculated to prevent a conflict of *rights* and to insure to each the uninterrupted enjoyment of his own rights so far as is reasonably consistent with a like enjoyment of rights by others." *Cooley's Constitutional Limitations,* 7th Ed. p. 245.

It will be noted that this definition limits the power to the establishment of rules to prevent the conflict of *rights.*

In the case of *Truax vs. Corrigan,* 257 U. S. 336-338 the Chief Justice says of the constitutional guaranties in question:

"The Constitution was intended—its very purpose was—to prevent experimentation with the fundamental rights of the individual. We said through Mr. Justice Brewer, in *Muller v. Oregon,* 208 U. S. 412, that 'It is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking.' "

On page 768 of his *Constitutional Limitations,* Judge Cooley seems to have had in mind almost the same situation presented by the case at bar, though he was there dealing with the law of eminent domain, under which the property owner whose right of private ownership is disturbed is compensated.

"It may be for the public benefit that all the wild lands of the state be improved and cultivated, all the low lands drained, all the unsightly places beautified, all dilapidated buildings replaced by new; because all these things tend to give an aspect of beauty, thrift and comfort to the country and thereby invite settlement, increase the value of lands and cultivate the

public taste but the common law has never sanctioned an appropriation based on these considerations alone."

How much less then, if these objects may not be accomplished by the power of the state which compensates the private owner, may they be accomplished by a mere fiat of the state at the expense of the private owner.

At page 839 of the same treatise, Judge Cooley, discussing the police power and the right of contract, quotes with approval the language of Christiancy, J., in *People vs. Jackson and Michigan Plank Road*, 9 Mich., 285, 305, referring to the police power, as follows:

> "Powers, which can only be justified on this specific ground, and which would otherwise be clearly prohibited by the Constitution, can be such only as are so clearly necessary to the safety, comfort and well-being of society, or so imperatively required by the public necessity as to lead to the natural and satisfactory conclusion that the framers of the Constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it."

In *Tiedeman's State and Federal Control of Persons and Property*, Section 146, referring to police power, it is said:

> "The legislative prohibitions or regulation of the use and enjoyment of one's private property and land is in violation of constitutional principles when it is not confined to the prevention of a nuisance."

Freund in his work on *Police Power*, Section 511, uses the following language:

> "The constitutional prohibition against taking property for public use without compensation, applies to injury and destruction as well as to appropriation and it applies no matter for what purpose the prop-

erty is taken. If it is recognized that a change of grade entitles to damages, the right cannot be denied on the ground that the change was demanded by considerations of public safety."

* * * * *

"Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests; it may be said that the State takes property by eminent domain because it is useful to the public and under the police power because it is harmful, or as Justice Bradley put it, because 'the property itself is the cause of the public detriment.' "

"From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not."

This Court, in the case of *Munn vs. Illinois*, 94 U. S. 113, sustained the police power of the State of Illinois in the regulation of grain elevators, because such property was held to be affected with a public use, but the court sharply declined to regard the rule then established as an invasion of rights purely private. Thus the Court says:

"This does not confer power upon the whole people to control rights which are purely and exclusively private, *Thorp vs. Railroad Company*, 27 Vt. 143, but it does authorize the establishment of laws requiring each citizen to so conduct himself and so use his own property as not unnecessarily to injure another."

In *Munn vs. Illinois*, Mr. Justice Field filed a dissenting opinion. Clearly the views therein expressed were rejected by this Court as to property affected with a public use and devoted to industries like transportation or grain elevating, which so vitally affect the general interest. The

statement made by Mr. Justice Field with regard to the constitutional protection of the right of purely private property not so affected is, we believe, the law. On page 142 it is said:

> "The same liberal construction which is required for the protection of life and liberty in all particulars in which life and liberty are of any value, should be applied to the protection of private property. If the legislature of the state, under pretense of providing for the public good or for any other reason, can determine, against the consent of the owner, uses to which private property shall be devoted, or the prices which the owner shall receive for its uses, it can deprive him of the property as completely as by a special act for its confiscation and destruction. If, for instance, the owner is prohibited from using his building for the purpose for which it was designed, it is of little consequence that he is permitted to retain title and possession. * * * He is for all practical purposes deprived of the property as effectually as if the legislature had ordered his forcible dispossession. * * * There is, indeed, no protection of any value in the constitutional provision which does not extend to the use and income of the property, as well as to its title and possession."

See also *Coppage vs. Kansas,* 236 U. S. 1, pp. 18 and 19; *Wolf Packing Company vs. Court of Industrial Relations,* 262, 522, 267 U. S., 552, 569, and particularly *Buchanan vs. Warley,* 245 U. S. 72.

The case last cited involved a statute passed by the Legislature of Kentucky, limiting the right of colored people to purchase houses and live in residential districts predominantly occupied by white people. The act was held unconstitutional. Speaking of the purpose of the law, the Court says, by Mr. Justice Day:

> (p. 73) "This drastic measure is sought to be justified under the authority of the state in the exer-

cise of the police power. It is said such legislation tends to promote the public peace by preventing racial conflicts; that it tends to maintain racial purity; that it prevents the deterioration of property owned and occupied by white people, which deterioration, it is contended, is sure to follow the occupancy of adjacent premises by persons of color.

(p. 81) "It is the purpose of such enactments, and it is frankly avowed it will be their ultimate effect, to require by law, at least in residential districts, the compulsory separation of the races on account of color. Such action is said to be essential to the maintenance of the purity of the races, although it is to be noted in the ordinance under consideration that the employment of colored servants in white families is permitted, and nearby residences of colored persons not coming within the blocks, as defined in the ordinances, are not prohibited.

"The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to so do to a person of color, and of a colored person to make such disposition to a white person.

"It is urged that the proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.

"It is said such acquisition by colored persons depreciates property owned in the neighborhood by white persons. But property may be acquired by undesirable white neighbors, or put to disagreeable though lawful uses with like results."

In the case of *Pennsylvania Coal Company vs. Mahon.* 260 U. S. 393, there was involved the constitutionality of an act of the State of Pennsylvania limiting the right of

property owners to take coal from under the streets and highways of municipalities where it might cause unsafe conditions. Clearly here was a purpose to protect the safety of the public and yet the act was held unconstitutional. Mr. Justice Holmes, writing the opinion said:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. (Cases cited.) When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualifications more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. * * * In general it is not plain that a man's misfortune or necessities will justify his shifting the damages to his neighbor's shoulders. (Cases cited.) *We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.*" (Italics ours.)

Commenting upon the foregoing cases, the Court below said:

> "The principles of law therein announced, while dealing with different facts, are pertinent to the present case because of the clearly defined limitations set to the legislative disposition to extend the police power until private property is destroyed and the guaranties of the Constitution are annihilated."

See also *Eubank vs. Richmond*, 226 U. S. 137.

DANGER OF ENCROACHMENT ON CONSTITUTIONAL RIGHTS.

It has not been difficult for this Court to vindicate the great guaranties of the Constitution against direct attack. The trouble comes when these guaranties of individual rights of liberty and property appear to stand in the way of some genuinely benevolent and praiseworthy object which enlists support or enthusiasm, and when only a little infringement of the right of the individual is asked to be indulged. In such cases, this Court is often asked to stand aside and relax its guardianship over the Constitution in deference to the legislative discretion, which the Court is always prompt to recognize as belonging to a coordinate branch of the government. Yet the danger of frittering away the constitutional guaranties by successive encroachment has always been apparent to the courts. In Ohio this danger has been pointed out by the most eminent judges in our judicial history. In the case of *Railway Company vs. Commissioners*, 1 O. S. 77, 86, Judge Ranney said:

> "But, as the General Assembly like the other departments of Government, exercise only delegated authority, it cannot be doubted, that any act passed by it, not falling within the scope of legislative power, is as clearly void as though expressly prohibited. And we entirely agree with the Supreme Court of Pennsylvania in *Parker v. Commonwealth*, 6 Barr. 511, that 'it is this species of insidious infraction that is more to be feared and guarded against than direct attacks upon any particular principle proclaimed as a part of the primordial law; for attempts of the latter description will generally be met by instant reprobation, while the stealthy and frequently seductive character of the former is apt to escape detection, until the innovation is made manifest by the infliction of some startling wrong.'"

In the case of *Miller vs. Crawford,* 70 O. S. 207, 214, Judge Schauck says:

> "The conception that the legislature has creative power, by whose general exercise it may confer rights upon some without despoiling others, being without foundation in reason, is without rational limitation. That conception appears as the prompting of all legislation which is solicited and obtained by classes to aid them in the rivalries of business. Whatever may be thought of some legislation in which there is general acquiescence, no one would considerately say that these provisions of the constitution permit legislative participation in such rivalries."

And the same Judge in the case of *Williams and Thomas vs. Preslo,* 84 O. S. 345, in meeting the claim that legislative acts should not be adjudged unconstitutional upon doubtful considerations, said:

> "But nothing would be more fatal to the efficient exercise of the judicial function in constitutional government than to invoke, for the purpose of raising doubts, a rule devised for solving them. In that respect it is quite like the familiar rule respecting reasonable doubts as a test of the probative effect of evidence in criminal cases. He has been an inattentive student of the history of the state who thinks that public or private injury has resulted from a too devoted adherence to the provisions of the organic law. It seems to us that this act very plainly from its nature, takes its place among the enactments which constitute the promoted legislation of the state not suggested by comprehensive views of the rights and interests of all the people, but furthered by those who desire to obtain advantages not accorded by the general laws."

In *Coppage vs. Kansas,* 236 U. S. 1-18 it is said:

> "But, in our opinion, the 14th Amendment debars the states from striking down personal liberty or prop-

erty rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restrictions of liberty or of property rights cannot of itself be denominated 'public welfare,' and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment.

In *Boyd vs. United States,* 116 U. S. 616, at page 635, Mr. Justice Bradley said:

"Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon. Their motto should be *obsta principiis.* We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law."

RULINGS IN THE STATE COURTS.

It is impossible to reconcile the rulings of the Supreme Courts of the States upon the questions here presented. Each case is, of course, decided on its own facts. Many of them presented familiar restrictions, more or less demonstrably involving the public safety, health or morals. In some of the cases, although the opinions seem to sanction very wide extensions of the traditional police power, the facts involved do not necessitate the width of the rulings, but even this consideration does not make it possible to follow through these cases any thread which leads to an authentic definition and application of the constitutional restraints upon unlimited extensions of the police power.

Synoptic notes are found appended to *Spann vs. Dallas,* (Tex) 19 A. L. R. 1387, 1395, *Fitzhugh vs. Jackson,* (Miss.) 33 A. L. R. 279, 287, and *State ex rel. Austin vs Thomas,* (W. Va.) 38 A. L. R. 1490, 1496.

The first of these cases, *Spann vs. Dallas,* was decided by the Supreme Court of Texas in 1921. It holds that an ordinance forbidding the erection of a building for a store in a residence district, without consent of neighboring property owners and the approval of the building inspector, deprives the owner of his property without due process of law. The seventh paragraph of the syllabus says:

> "A law which assumes to be a proper regulation but deprives the citizen of the use of his property under the pretense of preserving the public health, safety, comfort or welfare, when it is manifest that such is not the real object and purpose of the regulation, will be set aside as a clear and direct invasion of the right of property without any compensation."

In the able opinion by the Chief Justice, it is disclosed that the question presented was the validity of the ordinance of the City of Dallas, prohibiting, under penalty,

the construction of any business house within what the ordinance denominates a residence district of the city, except with the consent of three-fourths of the property owners of the city and with the building inspector's approval of the design of the proposed structure. The decision of the Court is not made to rest upon the requirement of the property owners' consent but rather upon the constitutional limitation upon the police power. On page 1391 it is said:

> "The ancient and established maxims of Anglo-Saxon law, which protect these fundamental rights in the use, enjoyment and disposal of private property are but the outgrowth of the long and arduous experience of mankind. They embody a painful, tragic history,—the record of the struggle against tyranny, the overseership of prefects and the overlordship of kings and nobles, when nothing so well bespoke the serfdom of the subject as his incapability to own property. They proclaim the freedom of men from those odious despotisms, their liberty to earn and possess their own, to deal with, to use it and dispose of it, not at the behest of a master but in the manner that becomes free men.
>
> "Laws are seldom wiser that the experience of mankind. These great maxims, which are but the reflection of that experience, may be better trusted to safeguard the interests of mankind than experimental doctrines whose inevitable end will be the subversion of all private right.
>
> "The police power is founded in public necessity, and only public necessity can justify its exercise. The result of its operation is naturally, in most instances, the abridgment of private rights. Private rights are never to be sacrificed to a greater extent than necessary. Therefore, the return for their sacrifice through the exercise of the police power should be the attainment of some public object of sufficient necessity and importance to justly warrant the exercise of the power.

> The public health, the public safety and the public comfort are properly objects of this high importance; and private rights, under reasonable laws, must yield to their security.
>
> "Since the right of the citizen to use his property as he chooses, so long as he harms nobody, is an inherent and constitutional right, the police power cannot be invoked for the abridgment of a particular use of private property, unless such use reasonably endangers or threatens the public health, the public safety, the public comfort or welfare."

The whole of this opinion is an eloquent exposition of the true nature of the right of private property and a searching penetration of the ordinance under examination to discover its true purpose as against its fair pretenses. The second of the cases cited, *Fitzhugh vs. Jackson,* was decided by the Supreme Court of Mississippi in 1923. The first paragraph of the syllabus holds,

> "It is not within the police power of a municipality to enact an ordinance prohibiting the erection of a building for business purposes or the conducting of a business in a residential portion of the municipality."

The presiding Justice delivered the opinion of the Court. On page 285 of the opinion it is pointed out that "the ordinance makes no classification of businesses because of their nature or the necessary incidents of such business. It simply says no business can be conducted in the residential portions of the town, except under the circumstances therein named." This the Court holds to be an arbitrary interference with the individual use of private property by the owner thereof, not within the police power.

In the notes to the three cases cited, the history of the subject is traced from its beginnings. To the cases therein cited and digested, we desire to add the recent case of

Tighe vs. Osborne, Inspector of Buildings for Baltimore City, decided by the Court of Appeals of Maryland on the 10th day of December, 1925. The Maryland court had before it an ordinance of the City of Baltimore to regulate the use as distinguished from the construction of all buildings in Baltimore City, except those proposed to be used for residential purposes,—in other words, a comprehensive zoning ordinance. Primarily the case turns upon an attempted delegation of power to the Inspector of Buildings, but in the course of its examination, the Court feels called upon to comment upon the fundamental legislative authority itself and quotes with approval Section 112a of *Tiedeman on the Police Power,* as follows:

> "The legislature cannot prohibit a use of lands, which works no hurt or annoyance to the neighbors or adjoining property. The injurious effect of the use of the land furnishes the justification for the interference of the legislature. The legislative prohibition or regulation of the use and enjoyment of one's private property in land is in violation of constitutional principles, which is not confined to the prevention of a nuisance. A certain use of lands, harmless in itself, does not become a nuisance because the legislature has declared it to be so. The legislature can determine whether it will permit or prohibit the doing of a thing which is harmful to others, in the proper consideration of the public welfare; but it cannot prohibit as a nuisance an act which inflicts no injury upon the health of property of others. If the harmful or innocent character of the prohibited use of land furnishes the test for determining the constitutionality of the legislative prohibition, it is clearly a judicial question and is certainly not within the legislative discretion, whether the prohibited act or acts work an injury to others. If they do not cause injury or annoyance to others, the attempted legislative interference is unwarranted by the constitution and it is the duty of the courts to declare it to be unconstitutional."

See also:

Goldman vs. Crowther, Md. 128 Atl. 50;
Mayor etc. vs. Turk, Del. 129 Atl. 512;
State ex rel. vs. McKelvey, Mo. 256 S. W. 474;
Ignaciunas vs. Risley, N. J. 121 Atl. 783;
State ex rel. Lachman vs. Haughton, 134 Minn. 226;
State ex rel. Roerig vs. Minneapolis, 136 Minn. 479;
Blackman Health Resort vs. Atlanta, 151 Ga. 507;
State ex rel. Westminster Church vs. Edgcombe, 108 Neb. 859;
Byrne vs. Maryland Realty Co., 129 Md. 202;
People of State of Illinois vs. Friend, 261 Ill. 16.

The annotations to the case of *Windsor vs. Whitney, et al.,* 95 Conn. 357, 12 A. L. R. 669, covering the question of the validity of ordinances establishing building set-back lines, without provision for compensation, show the weight of the authority to be against the validity thereof.

The annotations to the case of *Westminster Presbyterian Church vs. Edgecombe,* 108 Nebr. 859, 27 A. L. R. 437, discuss the validity of ordinances limiting the area of a lot that may be covered by a building and indicate that the weight of authority is against the power to make such limitations not strictly required for fire protection, etc.

The *Ignaciunas vs. Risley* case, cited above, was in the Supreme Court of New Jersey. It involved a "comprehensive zoning" ordinance of the town of Risley and it was held that the town had no constitutional authority, under the police power, to deny a permit for the erection of a store building in a zoned district limited to residence use. The case went to the Court of Errors and Appeals, 125 Atl. 121, and that Court held it unnecessary to decide the constitutional question in that the powers of the town were

limited to police regulation of the sort "designated to promote public health, safety and general welfare" and the Court held that those powers had been exceeded and, therefore, the permit asked for by the plaintiff should have been granted. As to the claim that a store in a residence neighborhood "is in itself a menace to the public health and the safety" the Court of Errors and Appeals said, "Both common experience and common sense demonstrate the unsoundness of such an assertion." Further on this point the Court said:

> "On what theory can it be said that the restraining of the respondent from erecting a combined store and dwelling house upon his property will tend to promote the general welfare of the community? It is probable that its presence there, without regard to its use, would be objectionable to other property owners in the *immediate* neighborhood, who would prefer that business places should not be established in that part of the town. *But that is quite immaterial*, for such property owners have not acquired the right to impose upon owners of other property *in the vicinity* any restrictions upon the lawful use thereof. The ordinary use of property is not authorized by the general welfare clause of the statute to be prohibited because repugnant to the sentiments or desires of a particular class residing in the immediate neighborhood thereof, but only because such use is detrimental to the interests of the public at large. In other words, the restriction authorized by this provision of the statute upon the untrammeled use of property for the promotion of the general welfare of the community must be such as will tend in some degree to prevent harm to the public generally or to promote the common good of the whole people of such community. That the prohibition of such a building as is contemplated by him will not have any such effect seems to us to be manifest."

Since the decisions in the *Ignaciunas* cases, the subject has been before the Supreme Court of New Jersey in the following cases:

Losic vs. Bindra, 128 Atl. 619;
Sarg vs. Hooper, 128 Atl. 376;
Ingersoll vs. Village of South Orange, 128 Atl. 393;
Henry Becker & Son vs. Dowling, 128 Atl. 395;
Summit Porcelain Co. vs. Board, 128 Atl. 819;
Reimer vs. Dallas, 129 Atl. 390;
Plymouth vs. Bigelow, 129 Atl. 203;
Printz vs. Board of Adjustment, etc., 129 Atl. 123.

This series of cases has presented nearly all the different phases of zoning legislation and the opinions indicated have all pertained to general or "comprehensive zoning" ordinances and in each case the Court has held the refusal of permits unjustified because the particular restrictions preventing the plaintiff making use of his property as he desired were unreasonable and, therefore, invalid. In the case of *Printz vs. Board of Adjustment, etc.,* the last case referred to, the Court said:

> "* * * Which one of these two methods of approach should be used in this case is a question which goes to the root of our system of government; but without referring further to that, it is sufficient to say in our opinion we are not at liberty to examine the question from any other than a legal standpoint and therefore we cannot be controlled in our consideration of the validity of this ordinance by its possible benefit to the public, if in point of fact that benefit is purchased by appropriating the rights and property of individuals to the public use without just compensation and by the violation of the guarantees of the state and federal constitutions."

The ordinance before the Court, as in the case at bar, had a provision, which seems to be common to such or-

dinances as we have had occasion to look over, for a so-called Board of Appeals to whom applications could be made and it was authorized, in its discretion, to disregard the "strict letter" of the ordinance if "the spirit of the ordinance shall be preserved." As to this the Court says:

> "This sonorous but vague and cloudy formula is, to say the least of it, a poor and uncertain substitute for those guarantees of the state and federal constitutions which assure to every citizen the right to hold and enjoy the use of his property in any manner he pleases, so long as he does not thereby injuriously affect the health, security, or welfare of his neighbor or the public as the words 'health, security and welfare' have hitherto been understood in this state."

Further, as to the police power, the Court said:

> "For while the existence of the police power may be invoked to determine what rights are guaranteed by the constitution, it can never be invoked to justify an invasion of those rights once they are ascertained. And if in fact this ordinance does appropriate private property to a public use, or if it does deprive owners of their property without compensation, then such an invasion of private rights cannot be sustained under the police power unless the exercise of those rights menaces the public health, safety or morals."

In the case of *Spann vs. Dallas,* (Tex.), 19 A. L. R. above referred to, at page 1390 of the opinion the Court says:

> "*Constitutional powers can never transcend constitutional rights.* The police power is subject to the limitations imposed by the Constitution upon every power of government, and it will not be suffered to invade or impair the fundamental liberties of the citizens, those natural rights which are the chief concern of the Constitution and for whose protection it was ordained by the people. All grants of power are to

be interpreted in the light of the maxims of Magna Charta and the common law as transmuted into the Bill of Rights, and those things which those maxims forbid cannot be regarded as within any grant of authority made by the people to their agents. Cooley, Const. Lim. 209. In our Constitution the liberties protected by the Bill of Rights are, by express provision, 'excepted out of the general powers of government.' It is declared that they 'shall forever remain inviolate,' and that 'all laws contrary thereto shall be void.' "

"To secure their property was one of the great ends for which men entered into society. The right to acquire and own property, and to deal with it and use it as the owner chooses so long as the use harms nobody, is a natural right. It does not owe its origin to constitutions. It existed before them. It is a part of the citizen's natural liberty,—an expression of his freedom,—guaranteed as inviolate by every American Bill of Rights."

At page 1392, the opinion reads as follows:

"The ordinance is clearly not a regulation for the protection of the public health or the public safety. It is idle to talk about the lawful business of an ordinary retail store threatening the public health or endangering the public safety. It is equally idle, in our opinion, to speak of its impairing the public comfort or as being injurious to the public welfare of a community. Retail stores are places of trade, it is true, but as ordinarily conducted they are not places of noise or confusion. This is particularly true of small stores, such as it appears the plaintiff contemplated erecting. The ordinary trading that goes on within them is reputable and honorable, and can hurt nobody. According to common experience it is done in an orderly manner. *It could disturb or impair the comfort of only highly sensitive persons.* But laws are not made to suit the acute sensibilities of such persons. It is with common humanity—the average

of the people—that police laws must deal. A lawful and ordinary use of property is not to be prohibited because repugnant to the sentiments of a particular class. The ordinance visits upon ordinary retail stores, engaged in a useful business, conducted in an orderly manner, frequented and availed of by respectable people, and doubtless serving as a convenience to many, all the proscription visited upon common nuisances. In the face of common knowledge that they are ordinarily respectable and peaceable places for the conduct of perfectly lawful pursuits evolved out of recognized customs and habits of the people as old as American life, the ordinance deals with them as though they had all the offensive character of a nuisance. But their treatment, in effect, by the ordinance as a nuisance, does not make them so. It is a doctrine not to be tolerated in this country that either state or municipal authorities can, by their mere declaration, make a particular use of property a nuisance, which is not so, and subject it to the ban of absolute prohibition. *Yates v. Milwaukee,* 10 Wall. 297, 19 L. ed. 984."

"Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation."

In the case of *Goldman vs. Crowther,* (Md.) 128 Atl. 50, there was also involved a comprehensive zoning ordinance. The plaintiff was prevented thereby from using the basement of a dwelling for a tailor shop and he sought relief. A building permit was not involved because the use proposed did not require any remodeling of the building. The discussion centered on the constitutionality of the ordinance itself, the Court saying:

"There is nothing in the record from which it can be inferred that such use is offensive to the eye, the ear or the nose of a person of ordinary sensibilities."

Further the Court said:

"The question can be approached by either of two avenues: One, legal, the other, political and sociological. If approached by the former, the validity of the restraints and prohibitions of the ordinance depend upon whether they violate certain definite guarantees and assurances found in the federal and state constitutions and the law of the land. If approached by the latter, the question is to an extent freed from the embarrassments of harmonizing any apparently repugnant provisions of the act with those guarantees, since in such case the end to be accomplished and the benefits to be derived are the main factors to be considered, and the rights of mere individuals may be subordinated to the public convenience upon the principle that such rights are always subject to the paramount authority of the state to subordinate them to what is conceived by those speaking for it to be for the benefit of the state as representing all citizens.

"It may well be that the proposed construction may increase the fire hazard, and therefore involves the public safety, but that would be a proper subject for regulation by the building code or perhaps the zoning ordinance in prohibiting the erection of a building of such character, that is, by attaching an addition to be used for stores to a frame dwelling house. But this is not the prohibition of the building code or the zoning ordinance. The latter absolutely and unqualifiedly prohibits any and all buildings to be used for business purposes in the zone which includes prosecutors' property. We think in that respect the ordinance is unreasonable, and therefore unenforcible, and presents no basis for the refusal of the permit to the prosecutor. *This feature of these ordinances has so frequently been passed upon by the court as not to require citation of authority other than that of Ignaciunas v. Nutley,* 125 Atl. 121."

In the case of *Passaic v. Patterson Bill Posting Company,* 72 N. J. Law. 285, an ordinance to regulate the

erection of bill boards was before the court. It was held in the lower court that because the erection of such might be attended by danger in case of windstorm, etc., the ordinance could be sustained. The Court points out that the same danger exists in the case of buildings, fences, etc., and at page 287 says:

> "In determining whether a regulation is reasonably necessary to secure the public safety and therefore within the legitimate exercise of the police power, existing habits and customs are of great weight, and the universal custom of building upon the street line is cogent evidence that the public safety does not require that structures like bill boards should be set back from the line. * * *
>
> "If the presence of a store in a residence district of the city is a hurtful thing, so much so as to warrant its proscription by law, certainly it is not rendered less harmful by the fact that three fourths of the property owners of the immediate area,—many of whom may not reside there at all,—consent to its presence. Yet this ordinance, while treating the presence of a store as so injurious to the public as to justify the extreme penalty of its absolute prohibition, recognizes that if a certain number of property owners of the district approve of its presence, all of its injurious properties will disappear.
>
> "This feature of the ordinance, in our opinion, reveals its true purpose. It reveals with reasonable clearness that its object is not to protect the public health, safety, or welfare from any threatening injury from a store, but to satisfy a sentiment against the mere presence of a store in a residence part of the city."

The case of *Mayor, etc., vs. Turk,* (Del.) 129 Atl. 512, decided May 27, 1925, reviews most of the cases reported up to that time on the subject and clearly meets all the contentions in support of the validity of such legislation, concluding as follows:

"It still leaves untouched the primary question with which we are here concerned, viz., whether the right of private property can be taken away when the circumstances of its use are inoffensive and of injury to no one. I am unable to find in the mere comprehensiveness of a zoning ordinance any circumstances which render those things permissible which, if done on a smalier scale, or in the case of a partial zoning would not be permissible."

The Court points out that in the case of a partial zoning of a municipality, it would have to be assumed that the council in its discretion left the rest of the city in effect zoned for general purposes.

In the case of *Fitzhugh vs. Jackson,* 132 Miss. 585, above cited, the Court says:

"The fundamental rights of the people are inherent and have not been yielded to government control. They are not subjects of governmental authority, they are the subject of individual authority. Constitutional powers can never transcend constitutional rights."

CASES IN THE SUPREME COURT OF OHIO.

In Ohio the subject of zoning has been a matter of debate. There are conflicting decisions in the lower courts, but since the decision by the District Court in this case, the two cases hereinbefore cited have been decided by the Supreme Court of Ohio and must now be considered more fully. They are the *City of Youngstown et al. vs. Kahn Brothers Building Company,* 113 O. S. 17, 148 N. E. 842, and *Pritz vs. Messer, et al.,* 113 O. S. 89, 149 N. E. 30.

The *Kahn* case involved an ordinance establishing only a fraction of the terrtiory of the City of Youngstown into a district and providing that no building intended to be used as a dwelling should be erected in said district except as a single or two-family dwelling. The obvious object of the ordinance was to prohibit the erection of apartment houses in the district in question.

In the *Kahn* case the Supreme Court held the Youngstown ordinance unconstitutional as a taking of property without due process of law, and a taking of private property for public use without compensation. The decision is expressly based upon the holding that an apartment house in a healthful part of a municipality does not impair or endanger the public health, morals and safety of the district and of the municipality.

In the opinion, page 20, the principles governing the use and extent of the police power in such cases are clearly stated and they are not enlarged beyond the customary and traditional view of the power. On page 23 it is said:

> "A positive prohibition is imposed by the ordinance upon the erection of an apartment house upon residence territory within the district. Thus the owner is substantially deprived of the use of his property * * *. The police power, however, is based upon public necessity. There must be an essential public need

> for the exercise of the power in order to justify its use * * *. It is commendable and desirable, but not essential to the public need, that our aesthetic desires be gratified. Moreover, authorities in general agree as to the essentials of a public health program, while the public view as to what is necessary for aesthetic progress greatly varies. * * * Successive city councils might never agree as to what the public needs from an aesthetic standpoint, and this fact makes the aesthetic standard impractical as a standard for use restriction upon property. The world would be a continual seesaw if aesthetic considerations were permitted to govern the use of the police power. We are, therefore, remitted to the proposition that the police power is based upon public necessity and that the public health, morals or safety, and not merely aesthetic interest must be in danger in order to justify its use."

The opinion then proceeds to discuss the nature of an apartment house and its effect upon the lives of those who occupy them, and on page 25 it is said:

> "We see less reason for excluding an apartment house from a strictly residence district than for excluding a store or other business of a non-nuisance character from a strictly residence district. Ordinances prohibiting the establishment of a non-nuisance business within a residence district have frequently been held unconstitutional upon the ground that they constitute a taking of private property without compensation."

Finally the Court holds the ordinance is invalid and enjoins its enforcement.

In the *Pritz* case the City of Cincinnati had enacted a comprehensive zoning ordinance. Messer had taken out a permit prior to the passage of the ordinance and the ordinance itself expressly exempted from its prohibitions improvements for which permits had thus already been

issued. Pritz owning adjoining property, sought to enjoin the erection of an apartment house by Messer under his permit because of the prohibitions contained in the ordinance. The Supreme Court followed the Court of Appeals in its finding of fact and the judgment in the case affirmed the Court of Appeals in the following language:

> "The Court of Appeals, having found as a fact that a valid building permit was issued before the passage of its ordinance and the zoning ordinance itself containing a specific exemption within which this case falls, the constitutionality of the ordinance does not entitle the plaintiff in error to relief and the judgment of the Court of Appeals must be affirmed."

Obviously, as the Cincinnati ordinance in terms exempted the Messer permit, no discussion of the constitutionality of the Cincinnati ordinance was necessary. Nevertheless, the Court does discuss it and draws a distinction between a so-called comprehensive zoning ordinance and a district ordinance, setting forth that while municipalities have not the power to set up restricted districts, a different situation exists where an ordinance deals comprehensively with the whole territory of the municipality. This, however, is made to proceed upon the assumption that there is "*proper* exercise of the police power" and that "the laws and regulations are reasonably necessary for the preservation of the public health, safety and morals."

To the extent that there is conflict between the doctrines announced in these two cases, that in the *Kahn* case must be regarded as decisive, since the constitutional question was there squarely presented and decided, while in the *Pritz* case its decision was not necessary to the result and the discussion of it is *obiter*. Nevertheless, in the *Pritz* case, there is a restatement of the principles

announced in the *Kahn* case and again no enlargement of them. The constitutional question which is discussed in the opinion is rather a general discussion of the police power, without any particular facts in view or any claimed impairment of property rights which can be used to measure the reasonableness of particular regulations.

With great respect to the Supreme Court of Ohio, it is difficult to see a substantial distinction between the district regulations and comprehensive regulations so far as the rightfulness of the taking of property without compensation is concerned. Perhaps it is enough to say with regard to the *Pritz* case that since the court found Messer's permit valid and there was thus no question of the taking of anybody's property or the limiting of any use of the property in the case, there was no real necessity for the court to consider whether any feature of the Cincinnati ordinance was valid. Nothing in the decision in the *Pritz* case prevents a Cincinnati property owner in a proper case from raising the constitutionality of that ordinance as it may apply to his property, if a case arises in which his rights are impaired under the doctrine of the *Kahn* case.

So far as the Ohio cases are concerned, therefore, the *Kahn* case establishes the principles that were laid down in this case by the District Court, as the law of the State of Ohio, and we proceed to point out briefly some of the violations of these principles to be found in the ordinance here in issue.

APPLICATION OF THE LAW TO THE FACTS.

From all the foregoing, we believe the law to be correctly stated in 19 *R. C. L.*, pp. 805-806, as follows:

> "A municipal ordinance of a regulatory nature, in contravention of the natural rights of individuals, enacted under general charter powers, is not only required to be constitutional, but it must be reasonable as well; that is, the court before which it is brought must be able to say that it will tend to promote the public health, morals, safety or welfare; that the means adopted are adapted to that end and that it is impartial in operation and not unduly oppressive upon individuals."

In the light of that statement, we proceed to a brief examination of the ordinance in general, with the full understanding that we have nothing to do with the motives of the Council of the Village of Euclid, but have a great deal to do with the purpose of the ordinance which they enacted. We understand too that so far as this case is concerned, the appellee has no right to relief merely because there are exclusive, irrational or improper provisions scattered here and there through the ordinance. The appellee's rights depend upon the operation of this ordinance upon its property. If an inspection of this ordinance shows that it is not addressed in general to the proper objects of the police power but is drawn on the erroneous assumption that the village has the power to regulate the use of private property in the interest of entirely fanciful or fantastic social or aesthetic grounds, then the particular restrictions applying to the appellee's property get their color and purpose from the general purpose of the enactment, and since the main purpose thus established for the ordinance as a whole is inadmissible, the appellee cannot be required to make the enor
contribution out of its property to its accom
which these restrictions entail.

The references in the following are to the ordinance as printed in the transcript of the record.

The ordinance undertakes arbitrarily and finally to determine that a certain amount of the territory of the village, less than the whole, is deemed and found to be sufficient for all industrial and commercial uses. (Rec. p. 13)

The ordinance is declared to be in fulfillment of a desire of the citizens of the village to "preserve the present character of said village" and to provide "for the general welfare of the citizens thereof," which may or may not be for the general welfare, as that term is properly used; that is to say, the general welfare which is the basis of the police power does not necessarily mean the particular local and private welfare of the people, or of some of the people, resident within the accidental political limits of this village. The general welfare which recognizes the Village of Euclid as merely a constituent element of our general society and expects it to share the burdens, as it enjoys the benefits common to that society, is the general welfare upon which the police power rests. (Rec. p. 13.)

The ordinance defines a single family dwelling and requires it to consist of a basement containing not less than 400 square feet, and not less than three rooms, and a bathroom. No part of any of the areas on the map opposite page 26, designated as U 1, can be used by owners for any other purpose than the construction of single family dwellings thus defined, and no such building may be erected in this territory on a lot having an average width of less than 40 feet (Rec. p. 21), and having a minimum area of less than 5000 feet. (Rec. p. 20)

No matter what the size of the lot in U 1 territory, nor however adequately built from the point of view of

sanitation, strength and safety, there may not be built in it a two-family dwelling, a double house or an apartment house, a church, a school, a public library, a bank or art museum (Rec. p. 16). If anybody owning land in a U 1 district builds a house on it and resides there, he may not conduct any business thereon except that a physician, surgeon, dentist or musician may have his office at his home and any person may carry on a customary home occupation provided that he employs no one to assist him therein and does not display, even by a small sign in his window, an announcement of the fact that such occupation is carried on there. Even the helpful occupation of renting rooms and table board, by which so many otherwise desolate people are admitted into the friendly atmosphere of family association as a substitute for hotels and restaurants, may not be conducted in U 1 territory, if so much as a sign of rooms and board is placed in the window. (Rec. p. 18)

Similar limitations are imposed upon territory designated as U 2 in the ordinance. Upon this only one or two-family residences may be erected. Apartment houses are excluded, churches, schoolhouses, libraries and banks are all prohibited, although by every canon of judgment these uses are harmless and contribute to the well-being of persons who live near them. In U 3 territory apartment houses for the first time are permitted, but they are grouped with hotels, churches, hospitals or sanitariums and public office buildings, all of which are excluded from the ampler environments of U 1 and U 2, so that instead of avoiding congestion, in accordance with one of the professed purposes of the ordinance, the most congesting uses are grouped together and restricted to very limited territory.

As we have already pointed out, the uses from Class U 1 to Class U 6 are cumulative. Each succeeding class

includes all of the permitted structures in the classes preceding it, in addition to those specifically enumerated for the class in question. That is to say, Class U 2 is Class U 1 plus two-family residences; Class U 3 is Class U 1 and Class U 2 plus apartment houses, hotels, churches, hospitals, etc. By this process in Class U 6 territory it is permitted to build industrial undertakings, sewage disposal plants, penal and correctional institutions, warehouses, banks, theaters, hotels, churches, schools, libraries, apartment houses, two-family residences and single family residences. If there were any genuine purpose in this ordinance to segregate family life from an industrial and commercial environment, no such situation would be tolerated. From that point of view, it is just as objectionable to allow a man to build his house next to a church as it is to allow the church to be built next to a residence.

The lot area restrictions set forth on pages 20 and 21 show a similar departure from any genuine public purpose. The lots on which the fewest people live are required to have the largest free area for light and air while those in which the most people live have minimum requirements for ventilation and light. The same theory runs through the set-back lines shown on pages 23 and 24 of the ordinance.

An inspection of the map shows graphically just what the real purpose of the ordinance is. The territory south of Euclid Avenue, which is wooded hillside, and the territory north of Lake Shore Boulevard, which is Lake Shore property, are obviously the most healthful and desirable residence portions of the village, yet from both of these all are excluded except those who are able to maintain the more costly establishments of single family residences. Except where the existing uses have already dictated otherwise, these two great sections of the village

are all Class U 1 territory. No apartment house or two-family house can be erected in either, and yet the men, women and children who, for reasons of convenience or necessity, live in apartment houses or in the more restricted surroundings of two-family residences are of all others most in need of the refreshing access to the lake or the better air of the wooded upland. By the obvious necessities of the case the territory between the two railroads will be industrially developed. All the people who live in the village and are not able to maintain single family residences of the size and lot area herein prescribed, are pressed down into the low-lying land adjacent to the industrial area, congested there in two-family residences and apartments, and denied the privilege of escaping for relief to the ridge or lake.

As to the property of the appellee, which the record indisputably shows, and the District Court found, to be especially suited for industrial and business uses, and which is in all points like other property, devoted to business uses, only a short distance west of it in the City of Cleveland, three kinds of use are permitted. Adjacent to Euclid Avenue itself, only two family residences, back of that for a short distance, apartment houses, and then stretching away to the Nickel Plate Railroad, industrial undertakings. But an industry seeking to use the appellee's land would not be permitted to set up office buildings or show rooms on the Euclid Avenue frontage, as is at present done practically throughout its entire length of ten miles from the Public Square in the City of Cleveland to the village limits of Euclid, nor could a drug store or insurance office, a church or public school or a public library be located there, nor could a private lane be constructed from Euclid Avenue as a means of access to a factory located in the southerly portion of this acreage.

All of these restrictions are, by this ordinance, sought to be made stronger than the mere legislative will which enacts them. It is, of course, the law that a legislature may not pass an irrepealable ordinance or impose limits upon its own legislative power, *State vs. Graves,* 19 Md. 351, but the Council of the Village of Euclid has specified that it and its successors may not amend this ordinance except by a three-fourths vote (Rec. p. 25), unless the proposed amendment shall have first received the approval of the City Planning Commission, which, of course, can have no part of the legislative discretion delegated to it, and if an amendment, duly presented and approved by the City Planning Commission, is protested against by the owners of 20% of the land within the area proposed to be altered, the Council may pass the ordinance only by a three-fourths vote. If the owners of 50% of the land in any area present a petition requesting an amendment to the regulation, the Council must vote within ninety days of the filing of the petition, but there is no relaxation upon the requirement that the proposed amendment will be inhibited except by a three-fourths vote unless the City Planning and Zoning Commission concur or if 20% of the land owners protest.

The enforcement of this ordinance is entrusted to the Board of Zoning Appeals and the Inspector of Buildings. From a decision of the Inspector of Buildings an appeal may be made to the Board of Zoning Appeals and where there are "practical difficulties" or what the Board of Zoning Appeals, in its unlimited discretion, may regard as "unnecessary hardships" in the way of carrying out the strict letter of the provisions of the ordinance, the Board of Zoning Appeals is given the power to interpret any such provision in general harmony with what it assumes to be "the general purpose and intent of this ordi-

nance," so that the public health, safety and general welfare, as those objects appear to the Board of Zoning Appeals, may be secured, and what the Board of Zoning Appeals regards as substantial justice done (Rec. p. 24).

In short, there is scarcely any attempted abuse of the police power which the courts have stricken down which is not attempted afresh in this ordinance.

The prospective purchaser of land from the appellee would, of course, look at the zone map and realize that any attempt by him to use land, if he were to purchase it from the appellee, would be either subject to these burdensome restrictions or freed from them only at the end of expensive litigation. If such a purchaser felt that the use for which he desired to purchase appellee's land was safe from any of the restrictions now imposed, he would yet realize that he was buying land in a municipality which claimed and exercised the right to dictate, at its uncontrolled will, just what uses he might make of the land and that the next act of the Council which enacted this ordinance might make his purchase valueless for uses permitted at the time of the purchase, for the police power is a continuing power and, as this ordinance shows, a power which grows by what it feeds on.

The effect of this ordinance upon the appellee's property is amply shown by the record. Prospective purchasers have been warned off, the value of the appellee's land depreciated and the value thus taken from the appellee cannot be restored unless there be an authoritative pronouncement in its favor, stating limitations upon the right of the village Council to prohibit innocent and appropriate uses of its property.

The existence of Ordinance No. 2812 and the implications of power claimed by its enactment are the cause of the wrong and damage to the appellee.

ZONING.

In the foregoing we have disclaimed any desire to discuss the so-called philosophy of zoning. It is easy to be entrapped by a term and to fall into the logical fallacy of the ambiguous middle. Many so-called zoning laws are either limited to or contain provisions within the field of the police power, and we freely admit that as human progress develops, new conditions may arise and new discoveries be made that will cause new conceptions of social needs and bring within the legislative power fields previously not occupied, but we frankly do not believe that there has been any such development of new conditions as necessitates or justifies the communal control of private property attempted by this ordinance, or by many others, some of which have been sustained by state courts. Many of the benefits claimed by counsel for the Village of Euclid to flow from "zoning" are, in fact, the familiar consequences of processes of recognized validity. Building regulation, city planning and the concerted voluntary action of proprietors have accomplished and can accomplish all the protection which the safety, health and morals of a community require and many objects of an aesthetic kind as mere incidents. But the zoning power for which counsel contends is a power different in kind and is in effect a political and communal control of the uses to which an owner may devote his property. It is not the power merely to negative dangerous or anti-social uses, but the power affirmatively to select among admittedly harmless uses those which the political power deems the most popular and to prohibit all others. We do not believe this power exists. Nor are we at all sure that if there were such communal control recognized by the Constitution, its fruits would justify it. The theory of our liberty has always been to maintain the right of the individual

to his liberty and to his property and to allow free play to economic laws, private contract and personal choice. Concessions of personal liberty we are called upon to make, but we make them only when there is a rigid demonstration that the higher public good will be served. This is not only our legal theory, but it is a policy which has been abundantly justified by its results. The virility and initiative of our people has been preserved because we have not turned over to the state the duty of regimenting us, classifying us and directing the small details of our lives.

To assume that the Council of the Village of Euclid, or any other village is able to measure, prophetically, the surging and receding tides by which business evolves and grows, to foresee and map exactly the appropriate uses to which land shall be developed and the amount necessary for each separate use, in a complicated classification, is to assume a degree of wisdom which not only does not exist in municipal councils but does not exist anywhere. With the utmost freedom to impose restrictions by private contract, only small areas have been brought under such restrictions, and those for the most part temporary in character. Restraints and restrictions upon alienation and use, even when imposed by covenant, are looked upon with disfavor and construed strictly in the interest of the free transfer and use of property.

7 *R. C. L.* 1115 citing *Hutchinson vs. Ulrich*, 145 Ill. 336;

Hitz vs. Flower et al., 104 O. S. 47, 57.

Yet the theory of zoning, in its ampler definitions, assumes that the municipal councils will be able to do, comprehensively, what private owners, most interested, have found it difficult to do, even on a small scale. Thus to sub-

divide a municipality, to classify it and crystallize restrictions into laws, is to embed a fly in amber. The forces of movement are stayed and growth is arrested. Around such an ordinance there come to be interests which feel themselves vested and changes in the ordinance, to respond to new needs, have to be made against the protest of those who have come to rely upon arbitrary artificial restrictions rather than to feel themselves subject to the operation of general economic and social laws, which they can measurably foresee and discount.

That our cities should be made beautiful and orderly is, of course, in the highest degree desirable, but it is even more important that our people should remain free. Their freedom depends upon the preservation of their constitutional immunities and privileges against the desire of others to control them, no matter how generous the motive or well intended the control which it is sought to impose.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1925.
Number 665.

The Village of Euclid and Harry W. Stein,
Inspector of Building,
Appellants,

vs.

The Ambler Realty Company,
Appellee.

REPLY BRIEF OF THE APPELLEE.

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REPLY BRIEF OF THE APPELLEE.

This brief on behalf of The Ambler Realty Company is filed by permission of the Court in response to the Reply Brief of the appellants.

The matters herein considered are as follows:

I. THE TRIAL IN THE COURT BELOW.

II. THE CLAIMS OF THE APPELLEE AS PLAINTIFF BELOW.

III. THE EVIDENCE ON THE QUESTION OF DAMAGE.

IV. SIMILAR ZONING ORDINANCES.

V. CONCLUSION, STATING RELIEF SOUGHT BY APPELLEE IN THIS COURT.

I.

THE TRIAL IN THE COURT BELOW.

In oral argument and in his reply brief, counsel for the appellant suggest that the trial court disposed of this case upon an inadequate consideration of the evidence. The fact is quite otherwise and the record is conclusive.

The bill of complaint was filed on the 5th day of May, 1923. (Rec. p. 1.) On the 20th day of July, 1923 the defendant filed a motion to dismiss, which was overruled on the 9th day of November, 1923. (Rec. p. 27) An answer was filed on the 14th day of November, 1923. (Rec. p. 28.) The case was argued and submitted on the 21st day of December, 1923. (Rec. p. 51.) Prior to the 21st day of December, when the case was argued, the parties had been engaged in the taking of evidence in deposition form, and all of the testimony had not been completely taken. The trial judge, however, gave unlimited time for oral argument and stated that counsel on both sides could state the facts and proofs as they believed they would be when the testimony was completed and that it could all be filed for his consideration before he decided the case.

Accordingly, on the 3rd day of January, 1924, counsel for the parties entered into a stipulation submitting all the testimony and exhibits to the Court, with the same effect as though they had been produced in open court, and submitting to the Court objections made as to competency, relevancy and admissibility as these objections appeared in the written transcript. (Rec. p. 51.)

On January 14, 1924, the trial judge filed his written opinion, in which he said:

> "Much of the evidence is immaterial; still more of it is without weight. Upon the facts the case really comes down to the provisions of the ordinance, certain physical facts characterizing the situation as it affects plaintiff's land, and the nature and extent of the impairment of its value by the ordinance restrictions. None of the important or controlling facts are in dispute, with the single exception of the extent of that damage; but even here there is no substantial denial that this damage is not only in excess of the jurisdictional amount but is substantial." (Rec. p. 52)

The Court then indicates a part of the evidence held by him to be immaterial and summarizes from the pleadings, exhibits and evidence the situation of fact out of which the legal questions to be decided arise. (Rec. p. 52.)

The trial judge lives in Cleveland and knows the situation. He doubtless knows all of the witnesses by name and reputation. He knows the physical situation, including the relation of the Village of Euclid to the metropolitan district of Cleveland, and for twenty years has watched the development of the business and industry of Cleveland, the changing character of many of the streets, the removal of industrial undertakings to new locations, and he is, therefore, ideally qualified to find, as he did find, that "the evidence clearly shows that the normal and reasonably to be expected use and development of the plaintiff's land along Euclid Avenue is for generally trade and commercial purposes, particularly retail stores and like mercantile establishments; and that the normal and reasonably to be expected use of the residue, including the restricted area, is for industrial and trade purposes. The evidence also clearly shows that the restrictive provisions of the ordinance in question impair the salability of this land and depress its present market value to the extent of several hundred thousand dollars. These restrictions, if sustained, the evidence further shows, will prevent the normal and reasonably to be expected increased value due to the availability of this land for trade, industrial and commercial purposes." (Rec. p. 53.)

On the 31st day of January, 1924, the final decree was entered. (Rec. p. 61.)

On the 28th day of July, 1924, the Court, by its order, settled the extent of the evidence and made the statements submitted in narrative form and approved by all counsel a part of the record. (Rec. p. 209.)

From the foregoing it is clear that all the claims of the parties as to the facts were freely stated in oral argument; that all of the testimony and exhibits were in the hands of the court from the 3rd day of January, 1924, to the 14th day of January, 1924, when the written opinion of the Court was filed; that the Court, in its opinion, discusses the testimony and exhibits, distinguishes the relevant from the irrelevant and extracts from the testimony all the facts admitted or controverted upon which the decision rests.

Those who know the diligence, ability and thoroughness which mark the work of the judge who tried this case will need no further assurance. Counsel for the appellants plainly did not feel that the trial court had failed to consider any part of the evidence, as no motion for a new trial was urged and no attempt made to call the Court's attention to matters now suggested to have been overlooked.

II.

THE CLAIMS OF THE APPELLEE AS PLAINTIFF BELOW.

The claims of the plaintiff below, as made by the bill of complaint, are three:

(1) That municipal councils have not the power and that state legislatures cannot give them the power, under the guise of the police power, to restrict uses of private property by selecting among admittedly innocent and inoffensive uses those which the municipal legislature prefers to have followed and prohibiting others equally inoffensive, to which the owners of property prefer, for economic or personal reasons, to devote it.

(2) That the provisions of Ordinance No. 2812 of the Village of Euclid are arbitrary, irrational and confiscatory, and that they are not in good faith an attempt to pursue

the police power, however generally that power may be defined in the interest of the public health, safety, morals or general welfare.

(3) That the operation of Ordinance No. 2812 upon the lands of the plaintiff has destroyed their salability by (a) restricting unlawfully the devotion of these lands to uses obviously appropriate and legitimate; and (b) by notifying prospective purchasers of land from the plaintiff that the Village of Euclid claims to exercise large but undefined, if not indefinable, powers of regulation and control so that prospective purchasers must face not only the irrational restrictions already attempted to be imposed but such further and future restraints upon the right of private property in the village as shall from time to time commend themselves to the political authorities of the village.

The result of this is that the plaintiff's market for its land is destroyed and a substantial part of the value of its land is confiscated.

Upon the foregoing three claims we comment briefly as follows:

(1) The power of the Village of Euclid derived from Section 3 of Article XVIII of the Constitution of Ohio, as set forth in the brief for the appellee at page 29, is that it

> "shall have authority to exercise all powers of local self government and to adopt and enforce within its limits such local police, sanitary and other similar regulations as are not in conflict with general laws."

Unless the power claimed here is a power of local self government, or this ordinance is such a "local police, sanitary or other similar regulation," then there is no power in the Village of Euclid to enact this ordinance. The Constitutional provision, it will be noted, speaks of local police

and sanitary regulations or regulations *similar* thereto. This language is definite, well understood and has limitations imposed by other provisions of the Constitution of Ohio and the Constitution of the United States, which are plain on their face and have been illustrated and enforced by decisions of this Court early and late, declaring that private property may not be taken for the public convenience or good, except by due process of law and upon the payment of compensation.

The constitutional guaranties of the rights of private property, which are universal in the State Constitutions of the United States and are further protected by inclusion in the Fourteenth Amendment to the Constitution of the United States, are not an idle form of words. They made their first formal appearance in our legal institutions in that provision of Magna Charta which provides:

> "39. NO FREE MAN SHALL BE TAKEN OR IMPRISONED OR DISSEISED, OR OUTLAWED, OR EXILED, OR ANYWAYS DESTROYED: NOR WILL WE GO UPON HIM, NOR WILL WE SEND UPON HIM, UNLESS BY THE LAWFUL JUDGMENT OF HIS PEERS, OR BY THE LAW OF THE LAND."

They have constituted a part of the right of all free men since that time. These rights are absolute and individual. They depend upon no communal consent and can be endangered by no legislative invasion. They are not abrogated by changes in public sentiment or weakened by a wide-spread public desire to ignore them as inconvenient in particular instances. Their value lies in their universality and their inviolability. The right of private property and the right of personal liberty are alike in this, that you can no more vote a man's property away from him than you can vote him into jail, and the fact that it would be more convenient to the public to vote his property away

from a property owner is as irrelevant as that it would promote the public convenience to vote him into jail.

These great fundamental rights are, of course, subject to limitations, but they are not nebulous limitations and are not subject to change each time a village council enacts a new definition.

Limiting our view to the right of private property, we find that Section 1 of the Fourteenth Amendment to the Constitution of the United States prohibits any state from depriving any person of his property without due process of law. Now just what is property in the constitutional sense? It is the right of ownership, complete, absolute and continuous, including the right to use or not, transfer or not, at times and on terms which lie in the will of the owner, subject only to the following limitations:

(1) That the need of the state is paramount and when property is required for the public need, it must be taken on the terms and in the manner provided by law by the exercise of the right of eminent domain;

(2) That the state has the right so far to regulate the use of private property as to prevent a use by one man from invading the right of others to a similarly free use of their property or to create a hazard to the health, morals or safety of the public generally. This under the police power;

(3) Private owners of property may not offend the large public policy of our institutions by unreasonable restraints upon alienation or use, but the power of the courts here is exercised to relieve against arbitrary restraints and unreasonable restrictions and not to impose them.

The limitation upon private ownership which subjects it to the power of eminent domain requires that the purpose for which the public takes shall be a public purpose as against a private convenience, however widely distributed.

The police power is an entirely different power from the right of eminent domain. It would obviously serve the public convenience and welfare to have a broad highway laid out through a congested section and this may be done under the power of eminent domain when the public is prepared to pay the private owner the value of what it takes from him, but an attempt under the police power to restrict land in such fashion that it could serve no other than highway uses would be a plain violation of the Fourteenth Amendment and while no such bald instance has arisen, this Court has been called upon to declare unconstitutional an attempt to widen a highway by establishing set-back lines at the expense of the property owners, which is, in effect, the same thing. *Eubank vs. the City of Richmond,* 226 U. S. 137. See also *Pennsylvania Coal Company vs. Mahon,* 260 U. S. 393.

Under the foregoing principles it is, of course, competent for the state to abate or prohibit nuisance uses of private property under appropriate circumstances; to regulate the height of buildings, the strength of materials entering into them, the safety of their construction and the adequacy of their protection against conflagrational hazard, both as affecting the occupants of the building and the rest of the community. For like reasons it is competent for the state to regulate sanitary appliances, to impose minimum standards of light and air, to regulate factories, workshops and tenements and to prohibit and punish acts which tend to deprave the public morals. But these powers are traditional and were a part of our law from the beginning, amplified in their application to meet changing conditions and fuller knowledge. Under the pretense of exercising them, the constitutional safeguards may not be swept away. The Constitution can be amended but it may not be disregarded.

Nor would the people of the United States willingly consent to any amendment of the Constitution which abrogated these safeguards. If it were proposed to amend the Fourteenth Amendment to fit this case by making it read:

> "Nor shall any state deprive any person of life, liberty or property without due process of law, *except that private property may be devoted to such uses and such uses only as shall be permitted by laws duly enacted by the legislatures of the States and their subordinate governmental agencies,*"

the proposal would be regarded as the suggestion of an irreverent jester or a madman.

For these reasons, without unduly extending the argument even to its fair implications, the plaintiff in this action denies that the state may restrict the uses of private property by selecting among admittedly innocent uses, those which it prefers to have followed, and prohibiting others equally inoffensive; nor can we conceive that it makes any difference whether the incitement to these restraints comes from other property owners, as is the case in *Eubank vs. Richmond*, above cited, or from the spontaneous action of a majority of a municipal council, after a consultation with persons expert in mapping out future public conveniences and betterments by disregarding other people's property rights.

(2) The provisions of Ordinance No. 2812 (apart from those restricting the land of the plaintiff, are discussed in the brief of appellee for two purposes, first, as showing the unlimited extent of the power claimed by the Village of Euclid over the uses of land lying within it, since this claim of power, when it takes the form of actual legislation, constitutes a part of the menace which has destroyed the market of the plaintiff for its land, and, second, as showing that the whole ordinance is arbitrary, irrational and confiscatory and that the damage done to

the lands of the plaintiff cannot be justified by any assertion that they are incidental to an otherwise proper and reasonable regulation of property rights under the police power. Counsel for the appellee, of course, understand that this Court cannot properly be asked to accept anything so vague as the "validity of zoning" as an issue of law to be decided. But it is manifest that the Village of Euclid would have no purpose in imposing the restrictions it has sought to impose upon the plaintiff's land unless it could lawfully impose many, if not all, of the restrictions set forth in the ordinance upon the rest of the land in the village.

If, therefore, the village has wholly misconceived its power and is pursuing a purpose which it may not lawfully pursue, that fact will best appear from an examination of this entire ordinance. One of the virtues claimed for the ordinance is that it is comprehensive and hangs together in all its parts and that nobody has a right to complain, because all are equally injured or benefited, as the case may be.

That the ordinance is thus unreasonable and arbitrary is conceded by counsel for the appellant in his reply brief. On page 22 he discusses the provisions of the ordinance which exclude churches, schools, orphan asylums and other like desirable structures from U1 and U2 territory, and makes the remarkable defense that these objectionable provisions of the ordinance were not put in in good faith to be taken at face value, but are rather a device, cunningly conceived, for the purpose of requiring persons, who plan to build such structures, to consult with the City Planning Commission in order that they may be advised and guided by the wisdom of that body. It is easy to see what sort of advice would be given to the trustees of an unpopular religious denomination who sought to build

a church in the village or to the trustees of an orphan asylum or school whose wards were of a particular race or religion, and so suggested those distinctions upon which our most hateful and virulent prejudices are aroused.

But quite apart from these obvious suggestions it must be clear that the legislature may not prohibit legitimate uses of land, having in the back of its head all the time that it means to permit them, if the persons who propose them will first subject themselves to the benevolent counsels of an official body, for whose guidance no rules are laid down except that they must not take the language of the law of their creation as meaning what it says!

And what becomes of the theory which seeks to justify this form of zoning by saying that it fixes and establishes property rights and gives people assurance that if they improve their property with reference to one situation, they will not find it impaired by undesirable invasions in their neighborhood? If the fact be that the ordinance does not lay down a rule of action to be followed, but is merely a coercive invitation to consult the Planning Commission which, with the cooperation of the City Council, is really to have discretion *ad personam* as to each applicant, the assurance is a delusion. Nor is it any answer from this point of view to suggest that the plaintiff has never made an application for a permit to build a church or school (Reply Brief of Appellants, page 26) or that few, if any, applications have as yet been made for permits to erect stores on Euclid Avenue or industrial undertakings along the railroads as is suggested in many places in both briefs of counsel for the appellants. This ordinance, if it is anything, is a law and according to its own preamble was passed for the purpose of preserving the present character of the village, so that it announces what may be done for all time and can be justified only on the

assumption that its plan is not only wise, but will continue to be wise and desirable when the village population grows congested and the lands in the village are sought for all the normal uses of city life. Certainly the owners of private property are entitled to something more assured, as to the right to devote their property to innocent uses, than a conclusive presumption that the village council will always wisely decide what particular use of a piece of land best comports with the convenience or even welfare of the local public.

These considerations affect the plaintiff in two ways. Its land is in the Village of Euclid and will increase or diminish in value as the village is allowed to have its normal growth and development on one hand, or prevented from having it on the other, and many of the irrational and illegal restrictions of the ordinance bear directly upon the land of the plaintiff, as we shall now proceed to show.

(3) By ordinance No. 2812 the land of the plaintiff is divided up so that the portion of it lying adjacent to Euclid Avenue and for 620 feet in depth therefrom is U2 territory. The next 130 feet is U3 territory and the residue, about 1000 feet in depth, is U6 territory. It follows, therefore, that the plaintiff is prohibited from using the 620 feet adjacent to Euclid Avenue for any other purpose than single family residences or two family residences. But there is no scrap of testimony in this record which in the slightest degree supports an assumption that the public health, safety, morals, general welfare or even convenience would be prejudiced by the building of banks, schools, churches, apartment houses or retail or wholesale stores on this property. Similarly with regard to the strip 130 feet designated U3, there is no basis for an assumption, unreasonable on its face, that that land is not available for and suitable for the building of banks, offices,

telephone exchanges, retail stores, sales rooms, printing offices and a large number of other uses which are prohibited by the ordinance. Indeed there is affirmative evidence in the record as to the propriety of these uses.

It is suggested in oral argument and said in the reply brief of the appellant that the purpose of these prohibitions is to prevent the building of railroad switch tracks up to Euclid Avenue, but the obvious way to prevent that is to prohibit it in plain terms, and in any case railroad switch tracks are not necessary for apartment houses, churches, banks and many other uses which are peremptorily prohibited in U2 and U3 territory.

As a matter of fact, we think this record shows that the entire tract of sixty-eight acres owned by the appellee is best fitted for development by large industries which, according to the modern practice, would put their shipping facilities near the railroad tracks, their manufacturing facilities south of that, their store rooms and stock rooms still further south and use Euclid Avenue frontage for office buildings and such show rooms as are desirable and useful. This suggestion is not fanciful, but is an actual description of what modern industry is now doing whenever it can find land so admirably adapted as the plaintiff's tract. Its nearness to its labor market is facilitated by having an entrance on a great traffic highway like Euclid Avenue. The attractiveness of its premises is a part of the advertising done by the industry and the orderly progress of manufactured products through the plant, carries them in succession from the raw material supply to the factory, then into the stock room, and then into the shipping room, and thence on the railroad, so that the economies of industrial construction place the more attractive entrance on the public thoroughfare and

house the office and clerical forces on the public street away from the manufacturing and shipping ends.

The economies of modern production likewise dictate large land area and low buildings, to make possible continuous manufacturing operations without changes of floor, so that the plaintiff's tract is literally ideal in size, location and access to transportation facilities for such development, and the high cost of land so favorably situated, is only incidental to the saving which follows from these advantages. The Cleveland Tractor Company development immediately to the west, although temporarily suspended at the point where it has developed the first units of its factory adjacent to the railroad, shows exactly this trend. The land was acquired clear out to Euclid Avenue and as the company prospers and develops, exactly the improvements here suggested will characterize it.

But in any case, if it should turn out better to use Euclid Avenue frontage for stores or office buildings or banks or apartment houses, that could always be done and whether or not it is the better thing to do can be determined by no criteria so successfully as the economic advantages of one mode of treatment over another.

Our contention, therefore, is that ordinance No. 2812 does not attempt merely to prevent the building of switch tracks near Euclid Avenue, or to limit or prevent any other nuisance or unwholesome or unpleasant industry, but that it arbitrarily prohibits a whole category of innocent uses to which the plaintiff is entitled to devote its land, and that neither the ordinance and the briefs of counsel nor the oral suggestions of counsel in argument, supply any justification for these confiscatory restrictions.

III.

THE EVIDENCE OF THE QUESTION OF DAMAGE.

We will try to answer all that appellant has to say in its supplemental brief with regard to the value of plaintiff's land, unrestricted and as restricted by the ordinance in one general statement.

It will first be noted that appellee, by the various maps and photographs put in evidence, attempted to present to the court, as fully as practicable, the real physical conditions of appellee's land as well as similarly situated lands and the other territory of the Village. These maps and photographs show much the larger part of the land, between Euclid Avenue and the Nickel Plate Railroad, to consist of large undeveloped tracts—more or less land abandoned for farm use and awaiting its use and demand incident to the expanding needs of the growing metropolitan district, of which the territory of the Village is an integral part.

In the consideration of the value of plaintiff's land and other similar lands between Euclid Avenue and the Nickel Plate Railroad, there are, of course, many facts of which the Court will take judicial notice in connection with the admitted facts. The ordinance itself stamps the northerly end of appellee's land as industrial territory and this is true of all the other like lands similarly classified as U6 territory. The fair inference from this fact, supported by all the testimony, is that its development will primarily be for factory purposes. Certainly it cannot be considered as marketable for desirable residence use, and the reasons which make it undesirable, for such use, also diminish the value of the 750 foot strip lying between the industrial section and Euclid Avenue. A residence built within a few hundred feet of a factory, in U6 territory, is no more desirable to live in, if constructed within the same distance

from the same factory, even if it is built in territory classed by the ordinance as a U3 or U2 district. It is not disputed that Euclid Avenue, in the Village, is a main business street throughout its whole length and, as the Village develops, the frontage thereof in the Village will more and more be devoted to business—one cannot conceive of zoning, if the power be upheld, more than temporarily retarding such development. It must therefore follow that the part of plaintiff's lands, lying between the U6 line and Euclid Avenue, is not desirable for residence use and, not being desirable one would not expect it would be marketable for such purpose,—particularly is this true if industry and business located in residence neighborhoods are a "blight" as the advocates of "zoning" insist.

With such facts in mind, it seemed to us that the testimony as produced by appellee from the witnesses as to the value of appellee's land in the "raw," as a whole for any use (unrestricted), and its value as a whole restricted to residence use, would present the evidence of value to the Court in the most helpful way. Euclid Avenue, however, being a fully improved street affected the value of frontage thereon, so we supplied proof of its value separately unrestricted and restricted.

Appellant contends that because, except for the distance of 750 feet back from Euclid Avenue, the appellant can use his land for industrial purposes, and because some of the testimony as to value was given regarding the 68 acres as a whole—no damage has been shown. We have again checked the figures as to value in our main brief and find them fully supported by the record. But to aid the Court we will add the following which we think will make the presentation clear—confining ourselves first to that part of appellee's land within 620 feet of Euclid Avenue placed by the ordinance in U2 territory, and there-

by limited to single or two family residence uses. All the witnesses agree that this could well be developed for industrial uses if switches are set in from The Nickel Plate Railroad, *not switches up to the street but to give service on the rear of such frontage.* All the witnesses, however, agree that probably the most advantage could be attained by selling off the Euclid Avenue frontage to a depth of 150 or 200 feet for business and then developing for industrial use the rest of the tract. All the witnesses agree that this Euclid Avenue frontage is worth considerably more unrestricted against business—we repeat the figures as given.

Witness	Residence Use	Business
Kunkle	$60	$150 to $175
Witzel	60	150
Laronge	60	100
Greenlund	75 to 100	150 to 300
	4)280	4)725
	70	181.25

The 68 acres has about 1800 feet of such frontage and on the basis of the average of the highest of such figures the damage to appellee would be $200,450.00. Appellants' briefs, unless we have overlooked it, do not refer to these figures.

Taking off 200 feet for the depth of Euclid Avenue frontage there is left a strip 420 feet wide of said U2 territory. As to this appellants' witness Greenlund testified (Rec. 190) it "could be *developed* for residence purposes and *sold* for about $8400 to $8500 per acre." He had been asked how much of the selling price would have to be first put up by the allotter for development, selling and carrying expense. He said (Rec. p. 189)—

> "As to whether the ordinary allotter, allotting property for residence purposes, figures roughly approximately 25 per cent for raw land, 25 per cent for his carrying charges, and 25 per cent for his selling expense, and possibly 25 per cent profit, I don't know whether they all use the same or not. I am willing to accept your figures, but I think they are high."

At page 191 he also says that such percentages are too high but it all indicates that an allotter would not expect to pay much more than 25% of his expected retail selling price for "raw" land to be allotted.

Referring to this same strip between the Euclid Avenue frontage, 200 feet deep, and the 750 foot line, north of Euclid, restricted to residence purposes, witness Laronge, called by appellants, said (Rec. p. 202):

> "For the Ambler tract, eliminating 200 feet frontage on Euclid Avenue, I would say it would be worth $2000.00 per acre. That would be the value of the strip between the 200 foot frontage line on Euclid Avenue and the 750 foot line north of Euclid Avenue, for the same purpose, assuming you had streets which would give you ingress and egress to and from Euclid Avenue and the limited residence zone."

This same witness (Rec. 196) placed the value of this same acreage for industrial purposes at $8000.00 per acre. Witness Greenlund placed (Rec. p. 195) its value if sold for industrial purposes as follows, "If it were worth $6000.00 per acre as it is, it ought eventually to sell for from $8500 to $12000 per acre cut up into small parcels." Of course the cutting up to sell for industrial purposes would require a switch to be put in but that is more or less a nominal expense (Rec. p. 73).

These two witnesses, Greenlund and Laronge are the experts on whom appellant principally relies.

The strip if 420 feet wide, 1800 feet long would contain approximately 17 acres. On the basis of witness Laronge's figures, restricting said strip to residence purposes would decrease its market value $6000.00 per acre, or a loss to appellee of $102,000.00. This figure would be greatly increased if the values given by appellee's witnesses were used in the computation.

We have not separately referred to the 130 foot strip of U3 territory, prescribed by the ordinance lying, next northerly of the 620 feet of U2 land. It is apparent that, lying next adjacent to a factory district, it would have little if any value for U3 uses except for "Office Buildings and Buildings to maintain clerical help" as provided by the amendment (Rec. p. 44) to such U3 classification. And it would only have such value for such use if it could just happen to be combined with U6 territory in the rear. Except for this one use all that we have said about the 420 foot strip next south would apply to the 130 feet.

If the Court should attach any importance to the claim of appellant that some of the testimony of appellee's witnesses as to value was addressed to 68 acres as a whole rather than to the parts as separately zoned, we are quite sure that what we have said above will satisfy the Court that the values given by such witnesses were intended to apply to each acre of the whole, except as *otherwise* explained in their testimony, and was so understood by Court and counsel on hearing below.

Counsel for appellant at page 12 of his reply brief says that witness Laronge placed a value of $11,000.00 per acre on the 420 foot strip developed for residence purposes. He has failed to point out that this figure was the retail selling value per acre, cut up into 40 foot lots, with streets fully improved from which must be deducted

the cost of improvements, selling expense, carrying charges and profit to the allotter over the cost of the "raw" land. The testimony, which we quote above from this witness (Rec. page 202) giving $2000.00 as the maket value of the "raw" land for allotting purposes is the figure which we believe must be used.

As bearing on values of and demand for the land in question, again and again throughout appellant's brief occur statements to the effect that few if any stores or factories have been built within zones permitting such since the passage of the ordinance. The ordinance was passed November 13, 1922, appellee's bill was filed May 5, 1923, and all the evidence was put in during 1923. The Court will take judicial notice that business and industry had then barely begun to recover from the depression following the War, and all such references are almost wholly beside the record. It is true that there was not a rush of demand at the time of trial for business locations on Euclid Avenue. The maps disclose most of the territory along Euclid Avenue except at the old Village center at and near Chardon Road to be undeveloped—not even side streets laid out off from Euclid Avenue. But the evidence clearly shows a potential demand having a direct bearing on values and tending to determine the expected development.

At pages 45 and 46 of appellant's reply brief, in a "parallel column" form, there is an attempt to state what appellee has not proved of the allegations of the bill. We refer only to one matter—the actual industrial development within the appellant Village. At pages 70 and 71 witness Kunkle by name and description of each plant testified to just what the development then was and we believe that it fully sustains the bill.

IV.

SIMILAR ZONING ORDINANCES.

During the oral argument of this cause, counsel were asked by the Court whether, in a general way, zoning ordinances resembled that passed by the Village of Euclid. An answer somewhat more at large than was possible then may be helpful to the Court.

In a general way, zoning ordinances will be found to attempt regulations from three points of view,—height of buildings, proportionate area of lots permitted to be occupied, and uses to which land may be devoted.

Height restrictions have, of course, long been justified by obvious considerations of public safety. Reasonable regulations, with regard to the proportionate part of lot areas permitted to be occupied, have been similarly sustained by considerations of public health, based upon the need for light and air.

Use regulations have been justified wherever proposed uses involve nuisance features, as in the case of *Hadacheck vs. Sebastian,* 239 U. S. 394. There are, therefore authoritative cases which sustain the police power, operating from these three points of view and within these limits. Some "zoning ordinances" attempt to go no further and the fact that such regulations are contained in a comprehensive ordinance is no argument against them if they are reasonable and properly adjusted to the conditions to which they are to apply.

Many so-called zoning ordinances go much further than this and the excesses are almost always with regard to one or the other of two matters, first, attempts to widen streets by enforcing set-back lines, rather than by appropriating property and paying for it, and second, the uses to which property may be devoted. With regard to

the latter the impulse primarily came from a desire to limit the building of apartment houses, but gradually the apparent possession of power tempted the "experts" into aesthetic fields, and so many of the ordinances go much further.

We have examined copies of such zoning ordinances as are available to us in the public library of Cleveland, and for the convenience of the Court, we print here from them the restrictions in "residence districts." The restrictions are drawn, as the Court will observe, for large and populous cities, where the problems of congestion, traffic and transportation are serious as compared with the open country and undeveloped lands of the Village of Euclid, and yet it will be noticed that very many of the uses which the Village of Euclid prohibits in U1 and U2 territory, which together comprise half of the total area of the Village, are freely permitted in residence districts in these other cities.

A comparison of the restrictions in ordinance No. 2812 with those in the ordinances hereafter cited will show that nowhere has any such intensive and minute classification been attempted. Most of these cities have undertaken in a large way to separate residence uses, business uses and industrial uses, but the Village of Euclid imposes far more burdensome restrictions and devotes more than half of its area to single family residences, while it thrusts apartment houses, hotels, clubs, churches and banks, to say nothing of retail drygoods and grocery and drug stores, down either into or immediately adjacent to the district declared by it appropriate for heavy industrial uses.

ZONING ORDINANCE OF THE CITY OF DENVER.

Use District Regulations.

Section 3. Residence District Uses. A. Residence "A" District. In a residence "A" district no building or premises shall be used, and no building shall be erected which is arranged, intended or designed to be used, for other than one or more of the following uses:

(1) Single family dwelling. Two family dwelling Multiple dwelling.

(2) Church. School. Public Library. Public museum. Community building.

(3) Public park. Public playground. Public recreation building. School or college stadium or athletic field. Golf course. Polo field. Water supply reservoir, well, tower or filter bed.

(4) Railway right of way, not including railway yards. Passenger station.

(5) Farming. Nursery. Truck gardening. Non-commercial conservatory for plants and flowers.

(6) Private garage as provided in Section 10.

(7) Private club, excepting a club the chief activity of which is a service customarily carried on as a business.

(8) Philanthropic institution other than a penal or correctional institution. Hospital or sanitarium other than for contagious or infectious diseases and other than for the insane or feeble-minded.

B. Residence "B," "C" and "D" District. In a residence "B," residence "C" or residence "D" district no building or premises shall be used and no building shall be erected or structurally altered which is arranged, intended or designed to be used, for other than one or more of the following uses:

(1) A use permitted in a residence "A" district.

(2) Hotel. Dormitory. Sorority or fraternity house. Boarding house or rooming house.

C. Residence "E" District. In a residence "E" district no building or premises shall be used and no building shall be erected or structurally altered which is arranged, intended or designed to be used for other than one or more of the following uses:

(1) A use permitted in a residence "A," residence "B," residence "C" or residence "D" district.

(2) Office. Studio.

ZONING ORDINANCE OF THE CITY OF ROCHESTER, N. Y.

Residential Districts.

Section 6. In a Residential District not lying within the boundaries of a district designed upon the maps as an "E" District, no business, trade or industry shall be conducted, and no land shall be used, or structures used or erected, except as otherwise herein provided, for other than one or more of the following specified uses, or for purposes necessarily or ordinarily accessory to such uses:

Dwellings of all classes;
Tenement houses;
Four-family dwellings or flats;
Hotels;
Lodging houses;
Boarding houses;
Clubs, excepting clubs the chief activity of which is a service or accommodation customarily carried on as a business—as a garage;
Churches or convents;
Schools;
Libraries or public museums;
Private offices of a physician, surgeon or dentist;
Philanthropic or eleemosynary uses or institutions other than correctional institutions;
Railroad passenger stations;

Real estate signs advertising the sale, rental or lease of the premises upon which they are maintained;

Recreational buildings in public parks and playgrounds;

Hospitals and sanitariums;

Farming, truck gardening, nurseries and greenhouses.

An accessory use shall not include a business, trade or industry, nor shall it include any structure not located on the same or adjoining lot under the same ownership, with the building or structure to the use of which it is accessory. A private garage for more than five motor vehicles, or a private garage for more than three motor vehicles, if used or erected as part of a common garage built upon and across the adjoining line of a lot under a different owner, or a private stable for more than three horses, shall not be considered an accessory use except upon a farm.

RESIDENTIAL DISTRICTS, CLASS E.

Section 7. In a Residential District lying within the boundaries of a district designated upon the maps as an "E" district, no business, trade or industry shall be conducted, and no structure shall be used or erected, except as otherwise herein provided, for other than one or more of the following specified uses, or for purposes necessarily or ordinarily accessory to such uses:

Single dwellings;

Two-family dwellings, double houses or Boston flats;

Clubs, excepting clubs the chief activity of which is a service customarily carried on as a business, such as a garage, apartment house or hotel;

Churches and convents;

Schools;

Libraries;

Private offices of a physician, surgeon or dentist;

Railroad passenger stations;

Real estate signs advertising the sale, rental or lease of the premises upon which they are maintained;

Recreational buildings in public parks and playground;

Farming, truck gardening, nurseries and greenhouses.

An accessory use shall not include a business, trade or industry, nor shall it include any structure not located on the same or adjoining lot, under the same ownership, with the building or structure to the use of which it is accessory. A private garage for more than five motor vehicles, or a private garage for more than three motor vehicles if used or erected as part of a common garage built upon and across the adjoining line of a lot under a different owner, or a private stable for more than three horses, shall not be considered an accessory use except upon a farm.

ZONING ORDINANCE OF EVANSTON, ILLINOIS.

Section 3.—"A" Residence District.

In the "A" Residence District all buildings and premises, except as otherwise provided in this ordinance, shall be erected for and used exclusively as:

1. Single Family Dwellings.
2. Churches and Temples.
3. Schools and Colleges.
4. Libraries.
5. Farming and Truck Gardening. And the usual accessories located on the same lot, not involving the conduct of a retail business, including a private garage, private stable or community garage when located not less than fifty (50) feet from the front lot line or in a fireproof compartment as a part of the main building, and including also home occupations engaged in by the occupants of a dwelling not involving the conduct of a retail business on the premises.

SECTION 4.—"B" RESIDENCE DISTRICT.

In the "B" Residence District all buildings and premises except as otherwise provided in this ordinance, shall be erected for and used exclusively as:

1. Any use permitted in the "A" Residence District.
2. Tenement Houses.
3. Hotels.
4. Private Clubs and Fraternity Houses.
5. Boarding and Lodging Houses.
6. Institutions of an educational, philanthropic or eleemosynary nature.
7. Nurseries and Greenhouses.
8. Public Garages, and their accessories, subject to compliance with the present ordinance requirements of the City of Evanston or those hereafter adopted.

ZONING ORDINANCE OF THE DISTRICT OF COLUMBIA.

SECTION III—RESIDENTIAL DISTRICT.

In the residential district all buildings and premises, except as otherwise provided in these regulations, shall be erected for and used exclusively as:

1. Dwelling.
2. Apartment houses or tenements.
3. Hotels.
4. Lodging or boarding houses.
5. Churches.
6. Private clubs.
7. Hospitals or sanitariums.
8. Institutions of an educational, philanthropic or eleemosynary character.
9. Transportation right of way or passenger stations.

10. Farms, truck gardens, nurseries or greenhouses.

11. Sand, gravel or clay pits.

12. The usual accessories located on the same lot with these various buildings not involving the conduct of a business, but including the office of a physician, dentist, or other person, when situated in the same dwelling or apartment used by such person as his or her place of residence and including also one private garage or private stable, located not less than 50 feet back of the front building line or in a fireproof compartment as a part of the main building and including also home occupations engaged in by the occupants of a dwelling not involving the conduct of a business on the premises; Provided, that no window display nor any sign other than a name plate not exceeding one square foot in area, and bearing only the name and occupation of the occupant shall be allowed as appertaining to use as offices or for home occupation as permitted under this section.

Provided, that in the residential district a public garage where no repair facilities are maintained, may be established, erected or enlarged if, when permit is issued, there are on file with the Commissioners of the District of Columbia, the written consents of the owners of 75 per cent of (a) the property within the square where it is proposed to establish, erect or enlarge such garage, and (b) any other property within 200 feet of the proposed establishment and not separated therefrom by a street; Provided, however, that no part of said garage shall be within 75 feet of any street building line. In computing the area of consents required under this regulation, so much of the property as is used as public garages or stables shall be counted as consenting. And provided, further, that private garages housing not more than two steam or motor driven vehicles and not appurtenant to a dwelling may be erected without consents when located 50 feet or more back of the building line of the nearest street, if abutting and opening directly upon a public alley.

The Commissioners of the District of Columbia may issue permits for a period of not more than one year for the erection in the residential district of buildings for commerce or industry, where such buildings are incidental to the residential development; and may issue permits for temporary use of premises by fairs, circuses or carnivals upon compliance with the Police Regulations of the District of Columbia.

ZONING ORDINANCE OF THE CITY OF DETROIT.

SECTION THREE. RESIDENCE DISTRICTS.

In a residence district no buildings or premises, except as otherwise provided in this ordinance, shall be erected or used except for one or more of the following uses:

1. Dwellings.

2. Churches.

3. Clubs, except clubs the chief activity of which is a service customarily carried on as a business.

4. Community garage, except in thirty-five foot height and bulk district.

5. Farms.

6. Greenhouses.

7. Hospitals or sanitaria.

8. Hotels, provided they conform to all the requirements of this ordinance for dwellings.

9. Institutions of an educational or philanthropic character other than correctional institutions.

10. Lodges or Temples.

11. Nurseries.

12. Railroad local passenger stations.

13. Accessory uses customarily incident to any of the above uses, including not more than one private garage but not including the conduct of a business. The term accessory use shall not include a use lo-

cated within fifty feet from the front lot line unless in the same building to which the use is accessory.

Signs pertaining to the lease, sale or use of a lot or building may be placed thereon, provided the total area of all such signs does not exceed eight square feet, and provided further that on a lot occupied by a dwelling the total area of signs placed on the lot or dwelling and pertaining to the use thereof or bearing the name or occupation of an occupant, shall not exceed one square foot for each family housed.

(For garages not herein permitted, cemeteries and temporary uses or buildings, see under Sec. XV-11 and XVI-5, 6, 7, 8.)

ZONING ORDINANCE OF THE CITY OF OMAHA, NEBRASKA.

Section 3. "A" Residence District.

In the "A" Residence District no building or premises shall be used and no building shall be hereafter erected or altered, unless otherwise provided in this ordinance, except for one or more of the following uses:

(1) One and Two-family Dwellings.

(2) Churches.

(3) Schools, Elementary and High.

(4) Libraries, Museums, Parks, Playgrounds, Branch Telephone Exchanges and Community Buildings owned and controlled by the municipality.

(5) Farming and Truck Gardening.

(6) Hospitals or Institutions of an Educational, Philanthropic or Eleemosynary Nature.

(7) Accessory buildings (See Section 17H) including one private garage when located not less than sixty (60) feet from the front line or within or attached to the dwelling. A private garage may exceed three (3) vehicle capacity provided the area of the lot whereon such a private garage is to be located shall contain not less than one thousand (1,000) square feet for each vehicle stored. The location of all private

stables shall be subject to the regulations of the Board of Health.

(8) Uses customarily incident to any of the above uses when located on the same lot and not involving the conduct of a business; including home occupation not involving the conduct of a business on the premises, and the office of a physician, surgeon, dentist, musician or artist, when situated in dwellings; provided no name plate shall exceed one (1) square foot in area. No signs exceeding eight (8) square feet in area appertaining to the lease, hire or sale of a building or premises, nor advertising sign of any other character shall be permitted in any "A" Residence District.

SECTION 4. "B" RESIDENCE DISTRICT.

In the "B" Residence District no building or premises shall be used and no building shall be hereafter erected or altered unless otherwise provided in this ordinance, except for one or more of the following uses:

1. Any use permitted in the "A" Residence District.
2. Multiple Dwellings.
3. Boarding and Lodging Houses.
4. Hotels.
5. Hospitals and Clinics.
6. Institutions of an educational, philanthropic or eleemosynary nature.
7. Nurseries and greenhouses for the propagation and cultivation of plants only.
8. Private Clubs, Fraternities, Lodges, excepting those the chief activity of which is a service customarily carried on as a business.
9. Accessory Buildings (See Section 17h) including private and community garages, when located not less than sixty (60) feet from the front lot line or within or attached to the dwelling. A private or community garage may exceed a three (3) vehicle capacity pro-

vided the area of the lot whereon such a private garage is to be located shall contain not less than one thousand (1,000) square feet for each vehicle stored. The location of all private stables shall be subject to the regulations of the Board of Health.

10. Uses customarily incident to any of the above uses when located in the same lot and not involving the conduct of a business; including home occupation not involving the conduct of a business on the premises, and the office of a physician, surgeon, dentist, musician or artist, when situated in the dwelling; provided no name plate exceeding one (1) square foot in area, nor a sign exceeding eight (8) square feet in area appertaining to the lease, hire, or sale of a building or premises, nor advertising sign of any other character shall be permitted in any "B" Residence District.

ZONING ORDINANCE OF THE CITY OF PITTSBURGH.

Section 8. "A" Residence District. In this district the land may be used and buildings may be erected, altered or used only for the following

PERMITTED USES:

(1) One Family Dwelling;

(2) Two Family Dwelling;

(3) Double House;

(4) Multiple-Dwelling Class "A";

(5) Multiple-Dwelling Class "B";

(6) Church;

(7) Institution (public or semi-public) educational or charitable;

(8) Telephone Central Exchange, Sub-Station of Electric Light Works without Rotary Machinery, or Gas Regulating Station;

(9) Garden (Including Truck Garden);

(10) Nursery, Horticultural;

(11) Greenhouse;

(12) Accessory Uses incident to any of the principal uses above listed and not involving the conduct of a business. These accessory uses shall be:

(a) Accessory uses customarily incident to the above uses.

(b) A minor garage located not less than sixty (60) feet from the front lot line if a separate building, or in a suitable room within or attached to the dwelling. In the case of a corner lot no wall of the garage shall be nearer the street line than the side line of the main building, and also it shall be as far from the street as the line fixed by this ordinance for buildings on adjoining lots or as near thereto as the width of the lot will permit. In the case of a through lot, no wall of the garage shall be nearer to the rear frontage than the line fixed by this ordinance for buildings on adjoining lots, or nearer than fifteen (15) feet.

(c) A minor stable located not less than sixty (60) feet from the front lot line. In the case of a corner lot no wall of the stable shall be nearer to the street than the line fixed by this ordinance for buildings on adjoining lots. In the case of a through lot no wall of the stable shall be nearer to the rear frontage than the line fixed by this ordinance for buildings on adjoining lots or nearer than fifteen (15) feet.

(d) A sign or signboard, not exceeding eight (8) square feet in area, appertaining to the lease or sale of the premises.

(e) A name plate, not exceeding one (1) square foot in area.

(f) A sign or bulletin board, not exceeding eight (8) square feet in area, erected upon the premises of a church or other institution for the purpose of displaying the name and activities or services therein provided.

Section 9. "B" Residence District. In this district the land may be used and buildings or structures may be erected, altered or used only for the following

PERMITTED USES:

(1) One Family Dwelling;

(2) Two Family Dwelling;

(3) Double House;

(4) Church;

(5) School (Including Dormitory for Faculty or Students);

(6) Library;

(7) Garden (Including Truck Garden);

(8) Nursery, Horticultural;

(9) Greenhouse;

(10) Accessory Uses: (The Provisions shall be the same as prescribed in "A" Residence District, See Section 8).

ZONING ORDINANCE OF THE CITY OF MILWAUKEE.

SECTION 2. RESIDENCE DISTRICTS.

In a residence district no building, structure or premises shall be used and no building or structure shall be erected which is arranged, intended or designed to be used except for one or more of the following specified uses:

1. Single family dwellings, two family dwellings, apartment or tenement houses.

2. Lodging or boarding houses, dormitories or convents.

3. Hotels.

4. Clubs, excepting clubs the chief activity of which is a service customarily carried on as a business.

5. Churches.

6. Schools, colleges, libraries or public museums.

7. Philanthropic and eleemosynary uses or institutions, other than correctional institutions.

8. Hospital or sanitaria.

9. Railroad passenger stations.

10. Farming, truck gardening, nurseries or greenhouses.

11. Accessory uses customarily incident to the above uses. The term accessory use shall not include—

a. A business outside the building to which it is accessory, or which occupies a total floor area in excess of 25 per cent of the floor area of one story of such building, or which by reason of the appearance of the building or premises, or the emission of odor, smoke, dust or noise or in any other way is objectionable or detrimental to the residential character of the neighborhood, or which involves features in design not customary in buildings for the above uses or any structural alteration of the building.

b. A garage other than a private garage on a lot occupied by not more than two families.

c. A group of private garages for more than four automobiles.

d. The storage of more than one commercial vehicle.

12. In undeveloped sections of the city a temporary building for use incidental to the residential development erected and so used for a period of two years from the date of the permit.

ZONING ORDINANCE OF THE CITY OF SEATTLE.

SECTION 3. FIRST RESIDENCE DISTRICT.

(a) The following uses only are permitted in a First Residence District:

(1) Single Family Dwellings.

(2) Public Schools.

(3) Private Schools in which prescribed courses of study only are given and are graded in a manner similar to public schools or are of a higher degree.

(4) Churches.

(5) Parks and Playgrounds (including usual park buildings).

(6) Art Gallery of Library Building.

(7) Private Conservatories for Plants and Flowers.

(8) Railroad and Shelter Stations.

(b) In a First Residence District, buildings and uses such as are ordinarily appurtenant to dwellings shall be permitted, subject to the limitations herein provided. A garage in a first residence district shall not occupy more than seven per cent (7%) of the area of the lot, and the business of repairing motor vehicles shall not be conducted therein. In the case of a private stable, the written consent must be obtained of the owners of fifty (50) per cent of the property within a radius of two hundred (200) feet of the proposed building. The number of animals, not counting sucklings, in a private stable shall not exceed one for every two thousand (2,000) square feet contained in the area of the lot on which such building is located. Not more than one appurtenant building having a floor area of not to exceed thirty (30) square feet which is used for the housing of domestic animals or fowls shall be permitted on any lot in the First Residence District, except that a building of greater area or a greater number of buildings shall be permitted when the written consent shall have been obtained of the owners of fifty (50) per cent of the dwellings within two hundred (200) feet of the proposed building; provided that such consent shall not be required if the number of said dwellings is less than four (4). The office of a physicial, dentist, or other professional person when located in his or her dwelling, also home occupations engaged in by individuals within their dwell-

ings shall be considered as accessory uses, provided that no window display is made or any sign shown other than one not exceeding two (2) square feet in area and bearing only the name and occupation of the occupant. The renting of rooms for lodging purposes only, for the accommodation of not to exceed six (6) persons, in a single family dwelling shall be considered an accessory use.

(c) A fraternity house, sorority house, or boarding house when occupied by students and supervised by the authorities of a public educational institution, a private school other than one specified in paragraph (a), this section (3), a community club house, memorial building, nursery or greenhouse or a building which is necessary for the proper operation of a public utility may be permitted by the Board of Public Works after a public hearing.

(d) Whenever the side line of a lot in the First Residence District constitutes the boundary of a Business District or where said Boundary Line extends entirely across said lot from front to rear then a multiple family dwelling such as a flat or an apartment house shall be permitted on said lot provided that such use shall not extend more than sixty (60) feet from said district boundary line.

(e) Nothing in this section shall be construed to prohibit the use of vacant property for gardening or fruit raising or its temporary use, conformable to Law, for fairs, circuses or similar purposes.

SECTION 4. SECOND RESIDENCE DISTRICT.

(a) The following uses only are permitted in a Second Residence District:

(1) Any use permitted in a First Residence District.

(2) All dwellings, flats, apartment houses and boarding or lodging houses without stores.

(3) Clubs or fraternal societies, except those the chief activity of which is a service customarily carried on as a business.

(b) Hospitals, sanitariums and institutions for philanthropic and eleemosynary uses, other than correction, shall be permitted in the Second Residence District, except that no private hospital or sanitarium for the treatment of inebriates or persons suffering from insanity or other mental diseases shall be established or maintained within the City of Seattle in any building situated within 200 feet of any private property, the owner of which has not consented in writing to the location and maintenance of such hospital or sanitarium nor in any building without a written permit from the Commissioner of Health of the City of Seattle. (See also Section 17, Paragraph (g).)

(c) In a Second Residence District, all the accessory uses specified in the First Residence District under Section 3, paragraph (b) shall be permitted, provided that all the requirements therein governing such uses are complied with. Uses listed in paragraph (c), Section 3, shall be permitted in a Second Residence District without public hearing or the consent of surrounding property.

(d) In a Second Residence District a garage located on the same lot with an apartment house may be permitted by the Board of Public Works after a public hearing, provided that the number of motor vehicles so housed shall not exceed the number of apartments within said apartment house, and provided further, that no repair shop, service station, or other business shall be conducted in connection therewith.

ZONING ORDINANCE OF THE CITY OF BALTIMORE.

Sec. 3. Residence Districts.

(a) In a residence district no building or land shall be used and no building shall be erected which is arranged, intended or designed to be used except for one or more of the following specified uses:

(1) Dwellings.

(2) Lodging or boarding houses, dormitories or convents.

(3) Hotels which have more than twenty sleeping rooms.

(4) Clubs, except clubs the chief activity of which is a service customarily carried on as a business.

(5) Churches.

(6) Libraries or public museums.

(7) Municipal recreational uses.

(8) Railroad rights of way.

(9) Farming, gardening, nurseries or greenhouses.

(10) Apartment garages, without repair facilities or gasoline filling stations, each apartment of which shall have not over two private motor cars, may only be erected in alleys or on the rear of lot. After posting and advertising, if no protest is filed the Zoning Commissioner may issue a permit for same, but if any protest is filed the Board of Zoning Appeal shall decide whether said garage shall be permitted.

(b) In a residence district no building or land shall be used for any other than a use above specified for which buildings may be erected and for the accessory uses customarily incident thereto. The term "accessory use" shall not include a business not customarily or necessarily incident to the use of a building permitted in a residence district, nor shall it include any building or use not located on the same lot with the building or use to which it is accessory, nor shall it include window display or large signs. A garage for more than three motor vehicles or a stable for more than three horses or cows shall not be deemed an accessory use, but this provision in regard to stables shall not apply to any parcel of land of five acres or more in area, used as a market garden, farm or country place. In an accessory garage not more than one commercial vehicle may be stored therein.

V.

CONCLUSION, STATING RELIEF SOUGHT BY APPELLEE IN THIS COURT.

On page 53 of his reply brief, counsel for appellants again claims that the Supreme Court of Ohio has sweepingly upheld the Cincinnati Zoning Ordinance. The fact is that the decisions of the Supreme Court of Ohio in the two cases of the *City of Youngstown vs. Kahn Brothers Building Company,* 112 O. S. 654 and *Pritz vs. Messer,* 112 O. S. 628, give no comfort whatever to the appellants in this cause. In the *Youngstown* case the Supreme Court of Ohio held void an ordinance establishing a fraction only of the territory of a municipality into a district, and excluding apartment houses therefrom, on two grounds:

First, that such a district ordinance did not take into account the rest of the city and therefore could not be rationally regarded as taking a comprehensive view of the public welfare; and

Second, because the ordinance excluded an apartment house from a "most healthful part of the municipality in which to erect an apartment house and that the public health, morals and safety of the district and of the entire muncipality will not be impaired by the erecting of such an apartment house."

So far as the *Youngstown* case, therefore, is concerned, it is against the appellants here on both grounds, for the Village of Euclid is, in fact, a mere district of the metropolitan city of Cleveland and its ordinance, while comprehensive for the district, totally disregards and does not pretend to consider the rest of the great metropolitan area of which it is a part in every material aspect except the accident of political lines, and second, this case is against the appellants for it expressly holds that the pro-

hibition of an apartment house in a healthful part of a city constitutes a taking of property without due process of law and a taking of private property for public use without compensation and is therefore void.

The *Pritz* case does hold the Cincinnati comprehensive ordinance valid, but the language of the decision limits the validity of such ordinance to those provisions which are "reasonably necessary for the preservation of the public health, safety and morals" and the Court expressly reserves for future determination any question with regard to that ordinance which raises the question of "the validity of specific use restrictions in Cincinnati not covered in this case." See 112 O. S. 651 and also *Kahn vs. Youngstown*, 112 O. S. at page 660, where it is said in commenting upon the *Pritz* case:

> "Moreover the instant case differs from the *Pritz* case in the fact that the *Cincinnati* case, upon the record, did not raise the specific question as to whether property can legally be zoned in residence districts so as to exclude apartment houses which in other respects comply with valid building restrictions."

So that the most that can be claimed for the *Pritz* case is a declaration by the Court that it will sustain use regulations which are reasonably necessary for the preservation of the public health, safety and morals, and against that position we have nothing to urge.

The appellee believes that it is obviously entitled to a decree which will remove the restrictions imposed upon its lands. As these restrictions are parts of an ordinance so intimately integrated in its provisions that it would be impossible for the Court to say how much of the ordinance the Village of Euclid would have enacted had it known the real limitations upon its power, the appellee believes that the decree of the Court should declare the entire ordinance

invalid and leave to subsequent legislative action by the Village the making of those regulations which it deems in the public interest after it has been advised of the protection afforded by the Constitution of the United States to the rights of private property.

The appellee also believes that the entire ordinance should be declared invalid because its existence upon the statute books arrests the normal growth of the Village in which its lands lie and so deprives the appellee of the enhancement in value which it has a reasonable and legal right to expect and also because the appellee has a right to have the market for its land restored by the removal of the menace, implicit in the ordinance, that the Council of the Village of Euclid claims the power to destroy the value of land lying in it in the interest of undefined objects and to an extent and for purposes which will change from time to time with the personnel of the village legislature.

Respectfully submitted,

NEWTON D. BAKER,

ROBERT M. MORGAN,

Counsel for Appellee.

In the Supreme Court of the United States

OCTOBER TERM, 1925
NUMBER 665

THE VILLAGE OF EUCLID, OHIO, and HARRY W. STEIN, Inspector of Buildings for the Village of Euclid,

Appellants,

vs.

THE AMBLER REALTY COMPANY,

Appellee.

On Appeal from the District Court of the United States For the Northern District of Ohio.

MOTION, BRIEF AND ARGUMENT AMICUS CURIAE

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(ARTHUR O. EDWARDS, JOSEPH McNITT, and F. J. DONAHUE, Associate Counsels on Brief.)

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In the Supreme Court of the United States

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MOTION

Now come American Wood Products Company, Northwestern Feed Company, Lyle Culvert & Road Equipment Company, corporations of the State of Minnesota, and T. Benson, by George T. Simpson, their Counsel, and respectfully move the Court for an order, granting them leave to file herein the appended Brief *amicus curiae.* upon the grounds as appears in said brief.

GEORGE T. SIMPSON
Counsel for American Wood Products Company, Northwestern Feed Company, Lyle Culvert & Road Equipment Company, and T. Benson. 730 Security Building, Minneapolis, Minnesota.

In the Supreme Court of the United States

OCTOBER TERM, 1925
NUMBER 665

THE VILLAGE OF EUCLID, OHIO, and HARRY W. STEIN, Inspector of Buildings for the Village of Euclid,

Appellants,

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Appellee.

On Appeal from the District Court of the United States For the Northern District of Ohio.

MOTION, BRIEF AND ARGUMENT AMICUS CURIAE

STATEMENT

The importance, legal and otherwise, of the questions involved in this litigation, the far-reaching effect, either way, of the decision of this Court in the above entitled matter, both legal and economic, upon the affairs, of at least, at present, *many* of the great cities of the Nation; and, if the power to "zone" be declared constitutional, the certain extension of "blanket" or "comprehensive" zoning to the many villages of the Nation; and finally the pendency of similar litigation in the District Court of the United

States, Fourth Division, for the District of Minnesota, affecting the City of Minneapolis, the decision of which pending litigation will be influenced, and, perhaps, entirely controlled, by the opinion in the cause at bar, constitute the grounds of this application. Further, it may be said that its purpose is to aid the Court toward a more comprehensive view of the general situation which we believe confronts this Nation, growing out of the attempt by persons, not always actuated by unselfish motives, to import this principle of "comprehensive zoning" into the affairs of its cities and villages.

The claims of the plaintiff, in the Court below, are rightfully, many, but in the end the claim of the Ambler Realty Company is contained in the statement that the "zoning" of its property by the Village of Euclid constitutes a "taking" of its property to an extent that amounts to confiscation without compensation.

We believe that a like situation exists, wherever, in this Nation, an attempt has been made to "comprehensively" zone municipal property. In some instances this "zoning" or "taking" is more vicious than in others; and property values thereby are more completely obliterated than in others, depending, sometimes, in part, upon the general makeup of the body imposing the restrictions, and again, sometimes, in part, upon the ignorance, selfishness, and ofttimes, dishonesty, of the members thereof; yet, in the end, the result is the same, for wherever it is situate, and by whomever zoning is imposed, *property* is always "taken" without compensation.

The attention of the Court, at the outset, is respectfully called to the history, present developments, and its underlying causes which apparently obtain

in the City of Cleveland, on the one hand, and to the same history development and causes in the Northwest, with particular reference to the Cities of Minneapolis and St. Paul, Minnesota, on the other hand.

In the case at bar the record shows that the City of Cleveland was founded in 1796 on a small area at the mouth of Cuyahogo River, and with but a few inhabitants; but that with the coming of the railroads there also came a large population and, particularly, a great industrial development which latter, naturally, followed the located rail lines, each being inter-dependent upon the other. That a part of this development ultimately spread to what is the Village of Euclid, now part of Greater Cleveland, and to a tract of land therein containing about sixty-eight acres and owned by the appellee. That this tract of land is served by the Nickel Plate Railroad which, in part, at least, is responsible for the availability, and value, of this land for industrial purposes. That for such purposes this land is reasonably worth from $8,000 to $10,000 per acre, or from $564,000 to $680,000 for the entire tract, while for residential purposes the land involved is not worth more than $2,000 to $3,000 an acre, or from $136,000 to $204,000 for the entire tract. That on this tract of land, so situate, and so conditioned, the Village Council of the Village of Euclid imposed an ordinance providing, in effect, that this land might be used in part only for industrial purposes.

The history of the present development of the cities of St. Paul and Minneapolis is much the same. These cities are approximately, seventy-five years of age. That is to say, seventy-five years ago, where now stand the Twin Cities, with their million of in-

habitants, was vacant prairie. The Government of the United States had then built Fort Snelling and there were a few huts on the present site of St. Paul, but they were inhabited only by Indians and a few whites. At the Falls of St. Anthony (now Minneapolis) a like settlement existed. There were no industries and no property values. Railroads had not yet been built and the only means of transportation were the ox cart and steamboat, in the summertime, and, the dog sled in the winter.

The assessed valuation of the real property situated in the City of Minneapolis, upon a basis of forty per cent of its real value, in 1925, was $249,109,685, and the assessed valuation of the same in the City of St. Paul, upon a same basis, in 1925 was $139,249,498. The value of the output of the industries of the City of Minneapolis for the year 1923 was approximately $491,382,000, and the value of the output of the industries of the City of St. Paul, for the same year, was approximately $149,638,000. Further these Twin Cities are distributing points for Northern Minnesota, the States of North and South Dakota, and particularly, the State of Montana, an empire in itself, of which only the surface has been scratched; and it may fairly be said that the development of these Twin Cities will continue unless arbitrarily stopped, until this vast territory, tributary to them, has become settled.

There are, probably, many factors which have brought about the result indicated above, but the agency which has contributed, mostly, to this is the railroads which center in the Twin Cities. They are chiefly, the Northern Pacific, Great Northern, Chicago, Milwaukee & St. Paul, Rock Island and Pacific, Minneapolis and St. Louis, Chicago Great

Western, Chicago & Northwestern, Chicago, Burlington & Quincy and the Minneapolis, St. Paul and Saulte St. Marie. These railroads serve as a means of communication between these cities and the entire Northwest, including the Dominion of Canada, and over their lines there is brought into these Twin Cities the products of the farms and forests of the Northwest in exchange for the merchandise, also likewise distributed, which is the product of the factories and industries, situate therein.

With this short statement, it is, perhaps a trite observation, that the welfare of the agricultural Northwest, the welfare of the railroads of the Northwest, and the welfare of the industries of the Twin Cities are closely inter-dependent.

In 1871, what is now the Chicago, Milwaukee & St. Paul, but then known as the St. Paul and Chicago, built into the City of Minneapolis, from the City of LaCrosse, Wisconsin, and shortly, thereafter, within the confines of the City of Minneapolis, constructed a line of railroad, on land to which it then owned, and still owns the fee, along the southeasterly bank of the Mississippi River, connecting the lines of the Milwaukee with the lines of the Great Northern; and, thereafter, and, for many years, prior to the attempt to impose a zoning restriction on property in the City of Minneapolis, an industrial situation, encouraged by the City of Minneapolis, grew up along the line of this railroad; thereupon many persons bought land, located themselves adjacent to this line of railroad, connected their respective industries with it by sidetracks, received their raw material, and shipped their finished products out over it, not only, to and from points in the State of Minnesota, but, also to and from points in other

states, the aggregate number of cars using this line in intra and interstate commerce at the time of the attempt of the City of Minneapolis, in 1924, to impose a "comprehensive" zoning ordinance, designating this property, *including the right-of-way* of this railroad as *"residential"* exceeding six thousand cars per month. The total value, in 1925, for industrial purposes, of the property so affected, and situate on this railroad, exceeded, in all probability, $5,000,000.

This industrial development is adjacent to a like industrial development in the City of St. Paul; is likewise near to and connected with, the property of the Minnesota Transfer Railway Company, a combination of the nine railroads above mentioned; and is, also, served by three arterial highways in the cities of St. Paul and Minneapolis, all affording an easy, convenient, and economical access to, and from these plants.

On the 3rd day of April, 1924, the City Council of the City of Minneapolis adopted a so-called Zoning Ordinance covering the entire city, designating the property above mentioned, actually including the right-of-way referred to, as "residential"—and prohibiting the erection, of any new or additional industry, and the remodeling, enlarging or repairing of existing industries or of any commercial enterprise upon the property so designated.

> Zoning Ordinance of the City of Minneapolis, pp. 527-572 City Charter and Ordinances of Minneapolis (1926 Ed.) by Arthur C. Pulling.

That the property involved could not be used for residential purposes, apparently, was not taken into account, or if noticed, was given no consideration, be-

cause of other reasons; nor, apparently, was any consideration given to the great loss that was sure to follow the enactment and enforcement of this ordinance.

The foregoing statement of fact is made, not with an intention of presenting to the Court the zoning situation in the Cities of St. Paul and Minneapolis, in and of itself, but because the facts, as already suggested, in the above entitled case are strikingly similar to the facts as they exist in these cities. In each case a blanket zoning ordinance was enacted; the character of the property is much the same; and the uses to which the respective tracts best may be put are analogous. While the case at bar, and the situation in the City of Minneapolis, it may be claimed, are aggravated instances of the abuse to which "zoning" may be put in the hands of incompetent or unscrupulous, persons, yet, we believe, we are on entirely safe ground when we assert that, not only, in these instances, but *always*, even if the last mentioned conditions do not exist, the imposition of a "blanket" zoning ordinance at best is fraught with great loss and damage to the property interest involved. The reasons for this are manifest and, while, perhaps, they need not be discussed here, yet, no harm will come from saying, that, the millenium has not yet arrived; and selfishness has not been taken out of the human heart; but that whatever may be the reason, the effect is the same.

To put the matter in legal phrase, the enactment of these zoning ordinances constitute, always, we contend, a violation of most of the applicable principles of the Constitution of the United States; or, other-

wise stated, the persons asking leave to file this brief, respectfully contend that the adoption of a "blanket" *zoning* ordinance by a municipality of the United States,

> Must, necessarily, deprive the owners of their property without due process of law, contrary to Article Five and Article Fourteen of the Constitution of the United States; and
>
> Must, necessarily, deprive such owners of property of the equal protection of the law, contrary to Article Five and Article Fourteen of the Constitution of the United States; and
>
> Is, **always**, so unreasonable as to constitute a "taking" of the property of such persons for a public purpose without just compensation, contrary to Articles Five of the Constitution of the United States.

ARGUMENT

At the outset of the discussion, it may be helpful to define "property" in the terms used by this Court:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The constitution protects these essential attributes of property. Property consists of the free use, enjoyment and disposal of a person's acquisitions without control or diminution save by the law of the land."
>
> Buchanan v. Warley, 245 U. S. 74.

And other Courts have well said:

> "The right to acquire property, to own it, to deal with it, and to use it, as the owner chooses, so long as the use harms nobody, is a natural right. This does not owe its origin to constitutions. It existed before them. Spann v. Dallas, 111 Tex. 350, 235 S. W. 513, 19 A. L. R. 1387. It is however, a right guaranteed by our constitutions. It is a right necessary to the exist-

ence of organized society. The protection of this natural right is one of the reasons which prompted man to form governments. The protection of private property is the aim of every well considered form of government. The right of private property has been called the keystone of the arch of civilization. A government which fails to protect the right of private property cannot endure. Men will not undergo the labor and hardships necessary to the acquisition of property if they find that the ownership and enjoyment thereof is not to be protected. With the right of ownership and possession goes the right to use, enjoy and dispose of the property owned. The substantial value of property lies in its use. If the right of use be denied, the value of the property is lessened or destroyed. A law which forbids a certain use of property deprives it of an essential attribute. The result in effect is a prescription of its ownership."

Ignaciunas vs. Risley, 121 Atl. Rep. 783.

The foregoing, undoubtedly, states the legal conception of *property* held, not only today, by most of us, but, also held, at the time of the adoption of the Constitution of the United States, by the men who framed it. Yet, the constitution did not formulate a new idea concerning property. It only put in written form the conception of property which was our heritage from the ages.

"Written constitutions sanctify and confirm great principles, but the latter are prior in existence to the former."

Webster's Works, 392

"The bill of rights in the American constitutions forbid that parties shall be deprived of property except by the law of the land, but if the prohibition had been omitted a legislative enactment to pass one man's property over to another would,

> nevertheless be void * * * The maxims of Magna Charta and the common law are the interpreters of constitutional grants of power. * * * The parliment of Great Britian indeed as possessing the sovereignty of the country has the power to disregard fundamental principles and pass arbitrary and unjust enactments, but it cannot do this rightfully, and it has the power to do so simply because there is no written constitution from which its authority springs or on which it depends and by which the courts can test the validity of its declared will. The rules which confine the discretion of parliment within the ancient landmarks are rules for the construction of the powers of the American Legislature." Cooley Constitutional Limitations, 7th. Ed. 244-245.

Coming to us then—from Magna Charta, and the common law, is *our* conception of property, and the rights which flow from its acquisition, not only "to own it and use it as the owner chooses so long as the use harms nobody," but, also, to rest secure therein. And it may be well observed, in passing, that this sense of security, that heretofore has generally come with the acquisition of property, under Anglo-Saxon institutions, has ofttimes, been just as valuable to the owner thereof, as has been the property actually acpuired.

This conception of property, and the rights which flow from it, and its possession, and, which guarantee its enjoyment, is as already suggested, particularly Anglo-Saxon in its character. True, other races own, and have owned property, and such other races, due to their history, and their environment, have had, and now have, differing ideas respecting its sanctity, its protection in the owner, and, the right of the sovereign power

to take it from him; with their various systems we have no quarrel here. But, it goes without saying, that it is *Anglo-Saxon conception of property* and *Anglo-Saxon* conception of the *right* of the *owner* to *own, use, and enjoy* his or her property which is under consideration at this time.

With the foregoing conception of the rights of private property in mind, the Fathers of the Nation, and those who followed in their footsteps, framed the Constitution of the United States, so as to provide as follows, so far as here material:

"ARTICLE V.

"No person shall * * * be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation."

"ARTICLE XIV.

"No state shall make or enforce any law which shall abridge the privileges or immunity of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

It is not proposed here, to attempt, to call to the attention of the Court, the many decisions of this Court bearing upon, and interpreting, these provisions of the Constitution. Perhaps, no good would be accomplished thereby. The Court is familiar with its own decisions. In saying this, it is not to be assumed that we are forgetful that certain phases of the controversy, more, or less, distantly related to the question under discussion, here, have been passed upon by this tribunal. But, we feel confident in saying that the question, as to whether or not, a *blanket* or *comprehensive zoning* ordinance, such as that adopted by the Village Council of the village

of Euclid, in the case at bar, and by the City Council of the City of Minneapolis, and following in their wake, using these ordinances as a model, those "blanket" zoning ordinances which undoubtedly, have been adopted, by many cities and villages, throughout the Nation, constitute a constitutional exercise of power, by these municipalities, is now before this court for the first time.

The question for determination here, then, is this:

Is the ordinance adopted by the Village Council of the Village of Euclid, within the inhibitions of the Constitution of the United States, to which reference has just been made?

Do ordinances, such as the one under consideration in the case at bar, "deprive" or "take" private property for a public purpose, "without compensation?"

If they so do "take" or "deprive" the owner of his property, is such "taking," nevertheless, in accordance with the law of the land and under such ordiances, is an ower of property so "taken" accorded equal protection of the law?

Concisely,—is "blanket" or "comprehensive" zoning constitutional?

ZONING

The Courts have said that the enactment of a zoning ordinance, and other similar ordinances, under color of authority, while outstanding, create a substantial cloud upon the title of the property, and that the only adequate relief is a decree ascertaining and declaring their invalidity and cancelling the cloud.

Ambler Realty Co. vs. Village of Euclid 297 Fed. 307.
Ex Parte Young, 209 U. S. 123.
Kennington vs. Palmer, 255 U. S. 100.
U. S. vs. Swartz, 255 U. S. 102.
Willard vs. Palmer, 255 U. S. 106.
Adams vs. Tanner, 255 U. S. 590.
Truax vs. Raich, 239 U. S. 33.
Block vs. Hirsh, 256 U. S. 135.
Brown Holding Co. vs. Feldman, 256 U. S. 170.

On the other hand, "zoning" has sometimes been called "City Planning." But, among the more ardent of its devotees, "zoning" has been defined as follows:

> "Zoning is regulation under the police power of the state. Police power is now exercised in the regulation of nuisances, the maintenance of building and housing codes, the establishment of conditions required for sanitation and fire prevention; and the enforcement of other ordinances deemed necessary for the promotion and preservation of the public health, safety, order, convenience, morals, prosperity and general welfare."
>
> "Zoning is an extension of this police power to regulate the use of all real property in the city so as to prohibit unsuitable and injurious uses of land or structures; to protect each owner from obnoxious noises, odors, gases and sights and the impairment of his just portion of light, air, and useable street area and to prevent the despoilation of property or the depreciation of values in established districts by the encroachment of improper uses."
>
> Harlan Bartholomew - Report to Planning Commission City of Minneapolis.

It is this statement of what "zoning" is, what it purports to accomplish in the affairs of mankind, and particularly the means that it intends to employ, unless prevented by the courts, that more nearly expresses what "zoning" means to those who are now

trying for many reasons, we believe, to have the judgment appealed from herein reversed.

Perhaps, originally, "City Planning" in a general way was intended, but now the word "zoning" has come to have an entirely different connotation, and is generally understood to mean the "taking" of private property, under the guise or cover of the police power, without compensation, and for a purpose, deemed by some Board, assuming that they act honestly, for what it claims is the public welfare. That, in truth and in fact, it is sometimes the private welfare, of a board member, or of someone connected with the Board, will not be seriously denied by those conversant with the facts.

It is not proposed to review here the conditions which exist in most of the cities of America, yet the incompetency and dishonesty, which by reason of many factors, dominate their affairs, is known to us all. What is desired at this point is to suggest, simply to the Court that the same persons, now in control of these affairs of these cities, are the same persons who would have control of "zoning," with all its temptations, if it is permitted by law; and to suggest, further, that if private property may be taken for the purposes above indicated, but, only, *with compensation paid,* which means a reflection of the amount, so expended, in the tax bill of the community, then the temptation to take private property, *without compensation,* for the purpose of some board member, or of some "cult," or favored few in the community, with its consequent hardship, and loss, to the owner of the property, is removed and the safeguards of the Constitution of the United States are retained.

"The statute in question is aimed in the wrong direction, and not in promotion of the general welfare, as that term for many years has been understood and applied by the courts. The intelligent thought of the day notes with some concern the increasing unrest and discontent with the trend of our civil affairs, prevalent among the people not only of state and nation, but the world over. Yet that same intelligence, apparently without thought or reflection, at the same time demands the enactment and enforcement of laws, the only tendency of which is to add to and accentuate in a measure conditions made the basis of such discontent—legislation, like the statute here involved, which in effect segregates the people into classes founded on invidious distinctions, extending to one thereof by positive law the powerful eminent domain arm of the State, by which one class may, on aesthetic or fanciful grounds, exclude from their selected neighborhood members of the other classes, and thus deprive them arbitrily of the free enjoyment of their property, although they may be of equal intelligence and moral standing with those thus temporarily vested with the use of that powerful state weapon. Heretofore the people in this country have been permitted to work out their own social relations unaided by direct legislation. And those who are willing to take cognizance for the moment of the history of civil governments and of the reason for the downfall of many of them cannot but be impressed that the general welfare will best be promoted by a continuance of that method of regulating matters of that kind. * * * The statute which is sustained is but a straw indicating a drifting from constitutional moorings toward class distinctions created and fostered by law." Brown C. J. and Dibell J. (dissenting) State exrel Twin City B. & I. Co. vs. Houghton, 144 Minn. 1, 23.

That a statute of the State of Minnesota, involving an exercise of the power of eminent domain, was under consideration in the foregoing case, is not material here. The philosophy, of this dissenting opinion, is equally applicable to the question here under discussion.

POLICE POWER.

The police power of the state has been defined as follows:

> "The due regulation and domestic order of the kingdom, whereby the inhabitants of a State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations."
>
> 4 Blackstone Comm. 162

> "The police power of a State, in a comprehensive sense, embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens, with citizens, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others."
>
> Cooleys Constitutional Limitations, 7th Ed. p. 828.

Nakedly, then, the question here is this: Does the exercise of the police power, contitutionally, permit of "blanket" or "comprehensive" zoning, and, the "taking" of private property, thereunder, for either, or all, of the purposes above indicated?

It is elementary that the police power is among those powers not delegated by, nor prohibited to the states, and is, therefore, among the powers reserved to the states or to the people. While this is true, it is equally well settled that its exercise, is nevertheless, subject to the inhibitions of the Constitution, and, that under the cloak of the police power, those inhibitions may not be flouted and rendered nugatory.

The legislature must not, under the guise of police regulation, arbitrarily, invade private property of personal rights. The test is found in the answer to the question whether the regulations have some real and substantial relation to the public health, safety or welfare, and, particularly, whether that is the end sought..

In re Jacobs 98 New York, 98
50 Am. Rep., 636
Calif. Reduction Co. vs. Sanitary
Reduction Works, 156 Fed. 26
(affirmed 199 U. S. 306).
People vs. Murphy, 129 App. Div. 260.
113 N. Y. Supp. 855.

While this phase of the matter is fully presented in the brief for the appellee, yet no harm will arise from, again, suggesting to the Court, that, if, it does not clearly appear that the public safety, health, or welfare is subserved by the imposition, by the Village of Euclid, of the ordinance in question upon the property of the Ambler Realty Company, and particularly, if the public safety, health, or welfare is not the end sought thereby, then the judgment of the court below is to be affirmed; and further that it is, indeed, difficult to comprehend how the public health, safety or welfare will be subserved

by the removal of manufacturing plants already existing, and the denial of the right to erect new plants situate in close proximity to a great Transcontinental railroad, with the multitudinous traffic that continually flows over its rails, and by the erection of *homes in their* stead. The contrary would seem to be the fact.

Cases additional to those above noted appear upon page 24 of this brief.

The police power deals with the conventions of society, with the changeable things of government, public health, the morals of the people, public peace and the public welfare, all of which change, sometimes, from day to day ofttimes from year to year, and always from decade to decade. Sometimes these changes come of their own force, the transition extending over a long period of time, sometimes by statute, with a short period of discussion, and sometimes, over night and while the army is in Europe. What was considered a virtue a hundred years ago is a crime today. There is, and there can be, of necessity, no fixed rule of determination. In regard to these matters, the lawmaker and the administrator, where these functions are involved, are adrift upon a sea of emotion, in which the conscience of the public, or the shifting winds of public opinion is ofttimes their only guide. The whole idea of the police power and its administration is its adaptabil, ity, both as to substance and form, to the ever-changing, so-called, "conventions" of mankind. Yet, it is this principle of government, *uncertain*, and at all times *shifting*, that the proponents of "comprehensive zoning" desire to apply to *real property, its uses and enjoyment*.

That the Constitution was intended, among other things, to *protect property and property rights, to* make *certain and sure* to the owners of property, the right to have and enjoy it, deal with it, as he sees fit, so long as he injures no one else, and, in the end, to transmit it in accordance with his desire, is not material to the mind of the enthusiastic "comprehensive" zoner. He would put that all away—all that makes for *certainty and security,* and, would substitute, in its stead, the everchanging, shifting application of the police power. The system of "comprehensive zoning," in effect thus, proposes to take away from the owner of property the right to determine for *himself* the use to which *his property* shall be put, and, in lieu thereof, to put it to a use, determined by someone else, who is *not the owner;* and when the owner has thus been deprived of the use of his property, "comprehensive zoning" further contemplates that the thus designated use shall not be changed, or in such cases where a change is permitted that such change shall then be dependent, as in the case of the Minneapolis ordinance, upon the consent of the surrounding property owners; or, as in the case at bar, upon the whim, or good-will, of the council, or other designated body.

As the learned trial judge in the case at bar points out, in his order directing the entry of judgment in favor of the plaintiff in the Court below, this system of "comprehensive" zoning places a "straight-jacket" on the property involved and thus effectually "takes," in a constitutional sense, the property and its use, from the owner for a public purpose but *without* compensation.

To say that the inhibitions of the Constitution

are not thus flouted, and, are not rendered nugatory by any of these so-called systems of "comprehensive" zoning, we respectfully suggest, is to deny not only the letter, but the spirit of the Constitution.

> "If this charter of State government, which we call a constitution, were all there was of constitutional command; if the usages, the customs, the maxims that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests; the precepts that have come to us from the revolutions which overturn tyrannies; the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so.—if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit; that which gives it force and attraction, which makes it valuable and draws to it the affections of the people; that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hundred years, many of which, in their expressions, seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give,—this living and breathing spirit which supplies the interpretation of the words of the written charter would be utterly lost and gone."
>
> People v. Hurlbut, 24 Mich. 44, 107.

But there is another, and, perhaps, more cogent reason why this ordinance should be declared in-

valid, as within the inhibitions of the Constitution.

As this Court has said:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The constitution protects these essential attributes of property. Property consists of the **free** use, enjoyment and disposal of a person's acquisitions without control or diminution save by the law of the land."
>
> Buchanan v. Warley, Supra.

To put the matters in another way, the right to acquire property, to own it, deal with, and to use it, as the owner chooses, so long as the use harms nobody, is a natural right, and, as before pointed out, this right existed long before the writing of the Constitution and the latter only confirmed it.

Yet, these zoning ordinances, assuming to interfere with this natural right, through the medium of some Council, or other designated body, delegate, of necessity, to such body *absolute* authority to determine what shall be the uses to which property shall be put. The use of the property thus depends upon the discretion, whim, or caprice of the designated body.

That this power, necessarily, one of the attributes of "zoning" is inconsistent with our Anglo-Saxon ideas of property, and the right to use and enjoy it no person of Anglo-Saxon heritage, at least, ought to deny. It is not a situation where the owner of property is using it to the harm of someone else. It is rather a situation where the owner of property

is using it, as he has a right to use it, until someone else wants to use it, as the latter person thinks, or, in some instances, pretends, or claims, to think it should be used.

The Court will readily sense some of the evils which would flow from this abuse of property rights. One common example will suffice;—Councilmen, by whatever name designated, come and go; the original ordinance may designate property as "residential;" in the course of a few years conditions change, and the best interests of the property will then demand that it be made "commercial," or, perhaps, "light" or "heavy" industrial; yet, the surrounding property owners, or some member of the designated body, to whom has been given power to decree the change of designation, then may have some alleged, or, at best, selfish, reason for opposing the change, and so defeat it; or if it more nearly suits the ultimate end in view, perhaps, will then grant the desired change to one person, but deny it to others similarily situate.

That this is not a fanciful picture a mere casual investigation of any zoning enterprise will demonstrate; but, that it results in a "taking" of property in one instance, without compensation, and, a denial of "equal protection" in the other, no one will deny. However, that such procedure takes away from the owner of property dominion over his own, over that which he has created, or, has lawfully inherited, and places such dominion at the caprice, or whim, of the designated body, made up of persons, ofttimes, not noted for their creative ability, at least, in the realm of property, all will admit.

> "The ordinance is wholly silent as to this, and but one inference can be drawn, which is that the city council may exercise its own discretion, judicial or capricious in the premises, and allow a permit to one and not to another under exactly the same conditions. There is no moral test prescribed, nor any rule of action or standard fixed by which the applicant may be controlled or governed, in order to qualify him as a suitable person to be allowed the permit. It is obvious that the ordinance is deficient in this respect, and accords to the city council arbitrary power respecting the plaintiff's property rights, and is therefore a nullity, in view of the Fourteenth Amendment to the Constitution."
>
> Heerdt v. City of Portland, Oregon, 8 f. (2nd) 871,872.

It is most apparent that if this Court upholds the right of a municipal corporation, thus to limit arbitrarily the right of land owners to erect, enlarge, remodel or repair structures on their lands, that then the progress and growth of industry will be made to depend upon the political ambitions of the respective members of the designated bodies; and that under such power, they could curb, restrict, or, even destroy any, or all, industry in one section of a city to the advantage of competing industries in another section of the same city.

The rights of property guaranteed to an owner by the Consitutions, can not be made light of, and, the subject of playful pastime, by legislatures, or bartered away under the guise of a police regulation.

Ex Part Sing Le, 96 Calif. 354, 24 L. R. A. 95
Hayes vs. Poplar Bluff, 263 Mo. 516, 173, S. W. 676.
Cory v. Atlanta, 143 Ga. 192, 83 S. E. 456.
People v. Chicago, 261 Ill. 16, 103 N. E. 609.
Yick Woo v. Hopkins, 118 U. S. 356, 30 L. Ed. 22
Village of Terrace Park et al v. Errett 12 123 (2nd) 240.
Investment Co v. McKelvey et al 256 S. W. 474, - 489 and 495
Cooper Lumber Co. v. Dammers, 125 Atl. 325.
Church v. Newcomb, 108 Nebr. 859, 189 N. W. 617.
Willerup v. Village of Hempstead, 199 N. Y. S. 56.
Isenbarth v. Bartnett, 201 N. Y. S. 383
Jersey Land Co. v. Scott, 126 Atl. 173.
Goldman v. Crowther, 128 Atl. 50.

It is respectfully urged therefore that for the reasons given "comprehensive zoning," or "blanket zoning," deprives the owners of their property without due process of law, contrary to Article Five and Article Fourteen of the Constitution of the United States, and of the equal protection of the law, contrary to Article Five and Article Fourteen of the Constitution of the United States; and is always so unreasonable a "taking" of property for a public purpose without compensation, as to render it contrary to Article Five of the Constitution of the United States; and in all things is contrary to, and violative of, the law of the land; and that for these reasons, the judgment of the Court below should be affirmed.

But in addition to what has just been said, there is another phase to this question of "comprehensive"

or "blanket" zoning, which, we believe, merits the attention of the Court.

The economic situation in the Northwest, and, perhaps, with isolated exceptions, throughout the Nation, is not of the best. And while it may not be a constitutional argument yet it is, respectfully, urged that "comprehensive" zoning does not help this situation, but rather adds to it and makes it more acute.

The manufacturer and transportation are closely inter-dependent. The success of one is the success of both, and the prosperity of these two, spell, in large letters, **prosperity** for the entire Nation. If the manufacturer cannot sell his product and if he cannot transport his product to market, his prosperity, is terminated; and, if transportation is unable to obtain freight, its prosperity is diminished by just so much.

So far as now appears, every attempt to inflict upon a municipality, a scheme of "comprehensive" zoning, has always had as its result, either the entire removal of factories from property adjacent to transportation facilities; or a denial of the right to extend factories already existing, or a denial of the right to construct new factories. Indeed, it is, perhaps, not going too far to say that gauged by the manifestations of its activity, the whole effect of "comprehensive" zoning has been to drive industry, away from its established seats in the cities, and to other locations, where a new home must be established, and that, too, regardless of the loss, and damage, which always occurs, in connection with an arbitary change in industrial conditions.

Sometimes this has been accomplished with an altruistic purpose in view, but more often the only available trackage, outside of that "zoned" is held by the members of the designating body, or their friends; and, the property, the use of which has been interfered with, has been so "zoned" with the sole interest, and purpose, of driving the owners therefrom and to the property of the friends of the designating body.

It will not do to say that where industry is thus interfered with, industry will find another place and carry on. Common experience is against such a claim. Money is timid, and if it cannot see protection in industry, it will retire from industry and will find investment in other lines—all with a consequent destruction to the markets of the manufacturer and transportation.

That this destruction of the markets of the manufacturer and the revenues of transportation constitutes a "taking" of the property of these factors of prosperity, no one will deny, and if the effect of "comprehensive" zoning is, thus to interfere with, and perhaps wipe out, these factors, and we earnestly contend that such has been, and will be, its effect, then *comprehensive* zoning should be denied.

CONCLUSIONS.

In conclusion, it is respectfully urged, upon the Court, that the theory of *"blanket" or comprehensive" zoning,* under the *police power* is foreign to the principles of constitutional government, as understood and practiced, for a century and a half in the United States of America. Under the American view, government is considered to be one of law and not of men, but these so-called Zoning Ordinances are attempts to reverse the rule by which we American people have heretofore been guided, and are, apparently, attempts to import into this country the European view that government is one of men and not of law. It is only of late years that this loose theory as to the rights of property. and its enjoyment, and right of government to take property, without paying for it, has had any alleged legal vogue in the United States. There are other theories of government, akin to the theory under which it is claimed these so-called Zoning Ordinances are valid, which of late have crept into the law of the United States, constitutional and otherwise, and which are now somewhat reflected therein; but it is a fair statement, in the plight in which this nation finds itself today because of those laws, that, in the same degree that we forget the ideas which surrounded the original enactment of the Constitution of the United States, and follow after these theories, and strange gods, of Europe, we breed for the Nation trouble, and, perhaps, disaster. The right of the individual to use and enjoy his property, as he will, and the right to conduct himself as he sees fit,

so long as he does not intrude upon the rights of someone else, has made this Nation great; and, the sooner we forget the ideas typified by these so-called Zoning Ordinances the better it will be for this Nation, and all the people who live in it.

It is earnestly suggested that in the interest of all persons the judgment appealed from should be affirmed.

Respectfully submitted,

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No. [redacted] 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

THE VILLAGE OF EUCLID and HARRY W. STEIN, Inspector of Buildings,

Appellants,

v.

THE AMBLER REALTY COMPANY,

Appellee.

Appeal from the District Court of the United States for the Northern District of Ohio, Eastern Division.

MOTION FOR LEAVE TO FILE BRIEF, AMICI CURIAE AND BRIEF ON BEHALF OF THE NATIONAL CONFERENCE ON CITY PLANNING, THE NATIONAL HOUSING ASSOCIATION AND THE MASSACHUSETTS FEDERATION OF TOWN PLANNING BOARDS, AMICI CURIAE.

ALFRED BETTMAN,

Counsel for The National Conference on City Planning, The Ohio State Conference on City Planning, The National Housing Association and The Massachusetts Federation of Town Planning Boards, Amici Curiae.

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MOTION FOR LEAVE TO FILE ATTACHED BRIEF, AMICI CURIAE.

Now come The National Conference on City Planning, The Ohio State Conference on City Planning, The National Housing Association and The Massachusetts Federation of Town Planning Boards by Alfred Bettman, their counsel, and move the Court for leave to file as *amici curiae* a brief herewith exhibited in the above entitled cause arising under the constitution and laws of the United States, and,

in support of this motion, beg to state that they are associations engaged in promoting city planning, including zoning; that they believe the power to zone to be essential to the health, convenience, safety, morals and welfare of the people living in American urban communities, and that the issues of this case, as set forth in the pleadings and in the briefs of the counsel of the parties thereto, include the question of the constitutionality of zoning and it is upon that question that they respectively ask leave to file said brief.

ALFRED BETTMAN,

Counsel for The National Conference on City Planning, The Ohio State Conference on City Planning, The National Housing Association and The Massachusetts Federation of Town Planning Boards, Amici Curiae.

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ALFRED BETTMAN,
Counsel for The National Conference on City Planning, The Ohio State Conference on City Planning, The National Housing Association, The Massachusetts Federation of Town Planning Boards, Amici Curiae.

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No. 665

IN THE

Supreme Court of the United States

THE VILLAGE OF EUCLID and HARRY W. STEIN, Inspector of Building,

Appellants,

v.

THE AMBLER REALTY COMPANY,

Appellee.

Appeal from the District Court of the United States for the Northern District of Ohio, Eastern Division

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BRIEF ON BEHALF OF THE NATIONAL CONFERENCE ON CITY PLANNING, THE OHIO STATE CONFERENCE ON CITY PLANNING, THE NATIONAL HOUSING ASSOCIATION AND THE MASSACHUSETTS FEDERATION OF TOWN PLANNING BOARDS, Amici Curiae.

(The opinion of the District Court in this case is reported in *Ambler Realty Company* v. *Village of Euclid,* 297 Fed. R. 197.)

PURPOSE AND SCOPE OF THIS BRIEF.

This brief is designed to discuss solely the question of the constitutionality of comprehensive zoning. We do not intend to argue any issues of either fact or law which may have been raised by the parties to the case, except as they

relate themselves to this matter of the constitutionality of zoning. The attorneys for appellee suggest that this case may turn upon the reasonableness or arbitrariness of that detail of the ordinance which has placed appellee's land in a residential rather than an industrial zone. We would agree that the decision in this or any other case may turn upon the reasonableness, that is, the general appropriateness of the specific districting involved in the case. In so far as the contentions of the parties relate to the reasonableness or arbitrariness of the Euclid Village ordinance itself in its districting of the particular property of the appellee, that is, in so far as the issues of this case relate themselves specially to this ordinance and its provisions for this piece of property, we do not feel it within our province to present any statement whatever. The attorneys of the appellee, however, have not chosen to restrict themselves to an attack upon a particular provision of this particular ordinance or the special nature of its effect upon the particular piece of property of the appellee, but have attacked the constitutionality of zoning of the general type of the ordinance in this case. As they have sought to support that attack by what we deem to be fallacious arguments on constitutional law, as well as entirely mistaken citation of authorities, and as many general expressions in the opinion of the District Judge may be and are being interpreted as adverse to the validity of zoning, and as we deem zoning to be a vital necessity to the welfare of that increasing majority of the inhabitants of the United States who live in urban communities, we have availed ourselves of the leave granted by the Court to file this brief.

WHAT IS ZONING?

Zoning is the regulation by districts of building development and uses of property. A typical zoning ordinance divides the territory covered by the ordinance, usually the whole territory of a single municipality, into districts, in each of which uniform regulations are provided for the

uses of buildings and land, the height of buildings and the area or bulk of buildings and open spaces. By use regulation is meant a statement of the permitted or prohibited uses of property and buildings, as, for instance, residential, business and industrial. Use districts are often further sub-classified, as, for instance, residential districts into those restricted to single-family houses and those in which multiple-family or apartment structures are permitted; business districts into central and local and those in which light manufacturing is permitted or excluded; industrial districts for light manufacturing, for heavy but non-nuisance types of industry, and nuisance or unrestricted districts. Height regulations fix the height to which buildings or portions thereof may be carried. Area regulations fix the amount or percentage of the lot which may be occupied by a building or its various parts and the extent and location of open spaces, such as building set-backs, side yards, rear yards. The typical comprehensive ordinance includes all these types of regulations.

A confusion in terminology, and, therefore, some confusion in the statements of the law has taken place by reason of an inaccurate use of the word "zoning" and by designating as "zoning ordinances" measures which are not entitled to the name. A zoning ordinance necessarily consists of a map of the zoned territory showing the boundaries of the districts, and of a text which applies the various regulations to the various districts as shown on the map. There are other types of ordinances often erroneously referred to as zoning ordinances. For instance, a customary type is one that sets forth a definition of a residential area according to the extent of actual residential development therein, and prohibits nonresidential developments in any area which may fulfill the definition. This sort of ordinance is more properly termed a "block" or "residential district" ordinance; but it is not zoning. It does not district the whole or a substantial portion of the city by means of a map, allotting each type of regulation to its most appropriate territory.

On the contrary, it selects certain portions of the city which have developed predominantly as residential, and protects these selected portions, without making any provision for the remainder of the territory of the city; and thus, in effect, it permits the existing users of property in the protected areas to determine the standards of use by other property owners. Many of these block ordinances have been upheld by the courts. Obviously, however, the true zoning ordinance, which is a comprehensive distribution of the whole or a major portion of the territory of the community among all the necessary uses of every kind, each with appropriate standards of height and occupancy, all worked out as a community plan for the promotion of the common health, safety and welfare, has elements of reasonableness which the block ordinance does not possess. Consequently the validity of a block type of ordinance shows, a fortiori, the validity of the comprehensive true zoning ordinance; but the invalidity of the block type does not indicate the invalidity of the true zoning ordinance. Several courts have recognized the basic difference, from a constitutional standpoint, between these types of measures. The courts of New York, Ohio and Louisiana, for instance, uphold zoning, including the creation of exclusively residential districts, but have invalidated certain block or residential district ordinances upon the express ground that these ordinances arbitrarily selected certain districts for protection and did not represent a careful, comprehensive plan for the zoning of the city. See *Wertheimer* v. *Schwab*, 210 N. Y. Supp. 312; *City of Youngstown* v. *Kahn Bros. Co.*, 112 O. S. 654, and *State, ex rel.*, v. *Harris*, 105 So. R. 33, 158 La. ———.

This brief is concerned with the constitutionality of the true zoning ordinance and not with the block or residential district type.

THE REMARKABLE SPREAD OF ZONING IN THE UNITED STATES.

That zoning represents a pressing need in growing American cities and urban regions is evidenced by the fact of the remarkable growth of the zoning movement. The first comprehensive zoning ordinance was that of New York City, adopted in 1916, though there were tentative types of such ordinances previous to that date, such as the Los Angeles use ordinances in 1909 and the Boston height zoning in 1904. The latest bulletin issued by the Housing and Zoning Bureau of the U. S. Department of Commerce states that on the first of January, 1926, 420 American municipalities had enacted zoning ordinances and more than 27,000,000 of our inhabitants were living under the protection of such measures. Hundreds of other municipalities are engaged in the preparation of zone plans. All but five states, as well as Congress on behalf of the District of Columbia, have passed zoning statutes. This alone demonstrates the conviction, on the part of those who deal with the problems of urban living in the United States, that zoning is absolutely essential if conditions of living are to remain tolerable and healthful. These facts indicate the existence of the need, and that zoning represents the "prevailing morality or strong or preponderant opinion" of the people of this country as to the best and most just method of controlling the development of growing urban communities in the interest of the health, convenience and welfare of their inhabitants.

VALIDITY OF ZONING HAS BEEN UPHELD BY SUPREME COURT OF OHIO AND CONSEQUENTLY THE ISSUE BEFORE THIS COURT IS RESTRICTED TO THE FEDERAL CONSTITUTIONAL QUESTION.

Since the instant case was decided by the District Court, the Supreme Court of Ohio has upheld the constitutionality of zoning in the case of *Pritz* v. *Messer*, 112 Ohio State

628, 149 N. E. R. 30. The situation with which the court was dealing in that case was concerned with area and height rather than with use regulations; but, being the first zoning case to reach it, the Ohio Supreme Court treated the validity of comprehensive zoning as involved, and both in the opinion and in the official syllabus, which, under the practice in Ohio, has the status of the authoritative statement of the law, the court passed upon the larger question, including use regulation. The official syllabus, adopting the title of the Ohio zoning statute, reads:

> "An ordinance enacted by a municipality under Article XVIII, Section 3 of the Ohio Constitution and under Sections 4366-1 to 4366-12, General Code, dividing the whole territory of the municipality into districts according to a comprehensive plan which, in the interest of the public health, public safety and public morals, regulates the uses and the location of buildings and other structures and of premises to be used for trade, industry, residence or other specific uses, the height, bulk, or location of buildings and other structures thereafter to be erected or altered, including the percentage of lot occupancy, set back building lines, and the area of yards, courts and other spaces, and for such purposes divides the city into zones or districts of such number, shape, and area as are suited to carry out such purposes, and provides a method of administration therefor and prescribes penalties for the violation of such provisions, is a valid and constitutional enactment."

Consequently, the conformance of zoning ordinances, of the type of the Euclid Village ordinance, with the constitution of Ohio must be treated as settled and determined, and the constitutional issue before this Court is restricted to the federal constitutional question.

THIS COURT HAS SUSTAINED THE VALIDITY OF ZONING REGULATIONS.

Zoning questions are not an entire novelty in this Court. On the contrary this Court, in two leading cases, has had

occasion to pass upon the validity of ordinances of a zoning nature and in each case upheld the ordinance.

Welch v. *Swasey*, 214 U. S. 91 (1909), upheld an ordinance of Boston, which divided the territory of that city into height zones or districts and prescribed the maximum height of buildings in each of the zones. The attack on the ordinance was based on the usual claims in this type of case—that the real purpose of the ordinance was aesthetic, that there was no substantial relation to health and safety, that the zone classification was arbitrary, that no compensation to property owners was provided. This Court overruled all these claims, and held that the relation of the measure to health and safety was easily observable, and that no compensation need be provided in cases of the reasonable exercise of the police power; and affirmed the judgment of the Supreme Judicial Court of Massachusetts upholding the ordinance.

Hadacheck v. *Sebastian*, 239 U. S. 394 (1915), is analogous to the case at bar, for in that case use regulation was involved. It was concerned with an ordinance of Los Angeles, which excluded brickyards and certain other industrial uses from a residential zone. The brick plant had been located before the district became designated as residential. The ordinance was therefore retroactive in its effect (which the Euclid Village ordinance is not) and the evidence tended to prove that the owner of the property would suffer heavy financial loss in the reduction in value of his property, if the ordinance were enforced against him. The ordinance had characteristics of both the block and zoning types and might be considered a partial zoning ordinance in that it was one of a group of measures which divided the city into residential and non-residential zones. This Court affirmed the judgment of the Supreme Court of California enforcing the ordinance. This decision, as well many state decisions which might be cited, effectively disposes of the contention of appellee that use regulation is unconstitutional though height and area regulation may not

be. Obviously the constitution makes no such distinction. Regulation of the use of property, when it bears a substantial relation to public health, welfare, etc., has exactly the same constitutional basis and justification as regulation of height and area or any other exercise of the police power over persons or property.

Since these two decisions, the technique of zoning has advanced to the comprehensive type, which includes height, use and area regulation as parts of a single plan, based on careful surveys, made more reasonable by careful adjustment to the economic, as well as social, factors involved. In the comprehensive ordinance, the locating of the districts and the height, use and area standards are adjusted to a carefully wrought plan for the promotion of the health, safety, convenience and welfare of the whole community. Such an ordinance is emphatically more reasonable in the constitutional sense than the separate height or use regulations embodied in the Boston and Los Angeles measures upheld by this Court.

The extent of the zoning movement, its importance to American urban communities and some adverse expressions in the opinion of the District Judge in this instant case warrant an extended discussion of the subject of the constitutional bases of zoning ordinances and their relation to public health, safety, convenience, morals, prosperity and welfare, even though these two prior decisions of this Court might logically be cited as conclusive.

Before entering into this discussion, we desire to refer to and dispose of two lines of attack and denunciation which are usually invoked in police power cases, namely, the charge that the measure under attack has an effect on the value of the complainant's property which in and of itself makes the measure unconstitutional (this effect being sometimes called "confiscatory"), and, secondly, the charge that the measure constitutes a taking of property without compensation.

EFFECT OF POLICE POWER REGULATION ON VALUE OF PURELY PRIVATE PROPERTY CAN NEVER BE THE TEST OF CONSTITUTIONALITY; FOR SUCH TEST BEGS THE CONSTITUTIONAL QUESTION.

The briefs of the attorneys of record contain frequent references to the effect of the ordinance upon the value of appellee's land. There is danger of confusion of thought as to the relevance and constitutional effect of evidence of this nature. The principle that pecuniary injury resulting from an exercise of the police power does not demonstrate or indicate the violation of constitutional limitations, is too well settled to require further argument or citations. To ascertain the value of the property previous to the enactment of a regulation and then to estimate the value with the regulation in effect and, if the latter figure be less than the former, to then conclude that the regulation must be invalid, is, obviously, a begging of the constitutional question. Such a contention seeks to disprove the existence of a legislative power by assuming a right to be free from such legislative power. The question before us, for instance, is whether the community has the power, as part of a comprehensive zone plan, to restrict property in certain districts to residential uses. To contend that, if the property was acquired for a non-residential use, the purpose of the acquisition would be impaired and the legislation thereby rendered unconstitutional, is a pure begging of the question. One may not speculate upon a community's not exercising its constitutional police power and then claim a vested property right in the community's non-action. In truth, the old value for which protection is claimed may have been produced, in whole or part, by the very evils against which the legislation is directed. The right to make a noise or congest the streets or impair the living conditions of a residential neighborhood may give a specific piece of land more value than it would have for residential

use; but surely there can be no such vested interest in any such right as would preclude the legislature from exercising its regulatory powers. In *Hadacheck* v. *Los Angeles*, *supra*, Mr. Justice McKenna, speaking for this Court, said:

> "It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precluded any limitation upon it when not exerted arbitrarily. A vested interest can not be asserted against it because of conditions once obtaining."

Consequently, whatever confiscation may mean in the constitutional sense, it can not refer to that effect on future speculative values which is a necessary incident of the very existence of the police power.

This does not necessarily signify, however, that evidence of the effect of a particular zone plan on the value of a specific piece of property has no relevance whatever to the constitutional issue. Property derives its value from its appropriateness, by reason of location, for certain uses, and the fact that a zoning ordinance causes a substantial impairment of value may be evidence, not conclusive or presumptive, but an item of evidence of arbitrary, unreasonable zoning; that is of zoning which, in fixing the boundaries between the various zones, has been careless of or has ignored this factor of appropriateness of location. The reasonableness of the plan, in the constitutional sense of reasonableness, is, of course, in issue in any case in which the validity of the plan is attacked, and this brings into issue the question whether the plan represents a genuine attempt to apply sound zoning standards, including a reasonable degree of consideration of the appropriateness of the various regulations to the different sections of the city by reason of location, topography, access to utilities, population trends and other factors. But to contend that a

showing of so and so much reduction in the value of a particular piece of land proves the invalidity of the ordinance, would plainly represent a confusion of thought and a begging of the constitutional question.

ZONING NOT A TAKING OF PROPERTY—QUESTION OF COMPENSATION NOT INVOLVED.

The attorneys of appellee dwell considerably on the absence of provision for direct money compensation to be paid to the property owners. This is wholly beside the point. The ordinance is frankly and expressly an exercise of the police power and not of the power of eminent domain. The community is not taking or destroying any property or property rights for public use. The ordinance is exclusively regulative. As stated in *Chicago, ex rel. R. R. Co.*, v. *People*, 200 U. S. 561:

> "If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution. Such is the present case. There are, unquestionably, limitations upon the exercise of the police power which can not, under any circumstances, be ignored. But the clause prohibiting the taking of private property without compensation 'is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given.' Sedgw. Stat. & Const. Law, 434."

In the case of *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 413, this Court said:

> "Government hardly could go on if to some extent values incident to property could not be diminished

> without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power."

Appellee's attorneys seem to rely greatly on this Pennsylvania Coal Company case. But the statute involved in that case is utterly different from and remote in kind, character and degree from a zoning law or ordinance. In that case the statute destroyed, not regulated, but destroyed a property title or interest expressly created by and reserved in a deed. The right of the mining company to mine coal was created by specific and express deeds and the statute expressly abolished that right. In stating the facts of the case, Mr. Justice Holmes, who delivered the opinion, said, p. 413:

> "As applied to this case the statute is admitted to destroy previously existing rights of property and contract." * * * "It (the statute) purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs."

The case at bar is in no way analogous to that case nor remotely similar. No property or contract right created by deed or other instrument is here in any respect abolished, suppressed, destroyed or even regulated. The property rights asserted are simply those which inhere generally in all owners of land; and it is axiomatic that all property is held subject to the general right of the public to regulate its use for the promotion of public health, safety, convenience, welfare. Zoning regulations are quite free from and outside of the scope of the Pennsylvania Coal Company case, in which specified property interests created by contract were destroyed by the statute. It is quite evident that this Court did not consider that case as having

any relevancy to regulations of the nature of zoning regulations; for not only did it not overrule, it did not even mention the cases in which it had sustained regulations similar to zoning regulations, namely, *Welsh* v. *Swasey*, *supra*, and *Hadacheck* v. *Sebastian*, *supra*. Surely if the Pennsylvania Coal Company decision had been conceived as in any respect modifying or overruling or affecting these cases, they would have been mentioned by this Court.

As stated by Judge Peckham in *Health Department* v. *Rector*, 145 N. Y. 32, 43:

> "Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffer, injury, it is either damnum absque injuria, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."

Eliminating from further consideration, therefore, these confusing contentions about compensation or confiscation, we address ourselves to the relevant issues involved in the question whether comprehensive zoning is within the constitutional scope of the police power.

THE STATE OF THE AUTHORITIES.

While there have been a few decisions adverse to the constitutionality of zoning, the favorable decisions greatly outnumber them; and the overwhelming weight of authority, as expressed in judicial decisions, is in favor of the constitutionality of zoning. Former assertions to the contrary were due to the fallacy of including, as citations, cases which do not involve true zoning ordinances but which are upon block or residential district or other types of ordinances, or cases dealing with questions of

statutory power or statutory interpretation and not with constitutionality. In his opinion in this instant case in the court below, Judge Westenhaver cited numerous cases but only two which involved true zoning ordinances, one of them from Missouri and the other a California case which has been since reversed by the Supreme Court of that state.

We desire to call to the Court's attention that since the decision of the District Court in the case at bar, the highest courts of Massachusetts, California, Minnesota, Ohio, Illinois, Oregon and Rhode Island, have each and all of them upheld zoning in clear-cut cases and with decisive opinions, and the highest courts of New York, Wisconsin, Louisiana and Kansas have reaffirmed their previous holdings to this same effect. Any contentions in the arguments before the District Court that the constitutional issue was in an uncertain, conflicting or indecisive stage has ceased to have any basis. Every one of these decisions upheld the creation of exclusively residential districts and the exclusion of nonnuisance industries and business therefrom, and many of them upheld the creation of exclusively single-family home districts from which apartment houses were excluded.

The following, so far as can be learned from available sources of which we know, constitute all the decisions, at the date of writing this brief (July 14, 1926), upon the constitutionality of zoning, both favorable and adverse. No case has been included in the list of favorable decisions unless it could be properly treated as a zoning case or unless decided wholly or in part upon or necessarily involving the constitutional question. Many cases on block ordinances or other types of property regulation lead logically to the upholding of zoning, but such cases have not been included. Many cases have arisen in the course of the administration of zoning ordinances, particularly in the state of New York, which necessarily assume the validity of the ordinance, but in which that issue was not raised or decided, and such cases have not been included in the list.

On the other hand, in the list of adverse cases have been included all those in which any provision of a zoning ordinance has been declared invalid or whose logic would invalidate zoning in general, even though the court expressly stated that it was not determining the validity of zoning in general or even though the court expressly upheld the validity of zoning.

In order that the list may be complete, we have included decisions of nisi prius courts and unreported cases.

Favorable Decisions of Highest and Appellate State Courts.

CALIFORNIA.

Blumenthal & Co. v. *Cryer*, 236 Pac. 216 (Cal. App. 1925). (Apartment in single-family district.)

Ex parte Quong Wo, 161 Cal. 220 (an early type of use zoning case treated by a rather strained process as a nuisance case); *Brown* v. *City of Los Angeles*, 183 Cal. 783, is similar; also *Ex parte Hadacheck*, 165 Cal. 416, affirmed under name *Hadacheck* v. *Sebastian*, 239 U. S. 394. (Laundry and brickyard in residential district.)

Fourcade v. *City and County of San Francisco*, 238 Pac. R. 934. (Supreme Court of California, 1925.) (Milk pasteurizing, bottling and distributing plant in residential district.)

Miller v. *Board of Public Works of Los Angeles* (Supreme Court of California, 1925), 234 Pac. R. 381. (Four-family apartment building in single and double-family district.)

Zahn v. *Board of Public Works of Los Angeles*, 234 Pac. R. 388 (Supreme Court of California, 1925), reversing 43 Cal. App. 663. (Store in residential district.)

ILLINOIS.

Deymzer v. *City of Evanston*, 149 N. E. R. 784, and *City of Aurora* v. *Burns*, 149 N. E. R. 790. (Supreme Court of Illinois, December, 1925.) (Apart-

ment house in single-family district and stores in residential district.)

KANSAS.

Ware v. *City of Wichita*, 113 Kan. 153, 214 Pac. R. 99. (Store in residential district.)

West v. *City of Wichita*, 118 Kan. 265, 234 Pac. 978 (1925). (Apartments in single-family districts.)

LOUISIANA.

City of New Orleans v. *Liberty Shop*, 157 La. 26, 101 So. R. 798 (1924). (Retail store in residential district.)

State, ex rel. Civello, v. *New Orleans, La.* (and other cases of the same group), 154 La. 271-295, 97 So. R. 440, 445, 446 (1923). (Stores and manufacturing plant in residential district.)

State, ex rel. Gianygrosso, v. *New Orleans*, 159 La. —, 106 So. R. 549. (Supreme Court of Louisiana, 1925.) (Filling station and soft-drink stand in residential district.)

MAINE.

Opinion of Justices, 124 Me. 502, 129 Atl. Rep. 181 (1925).

MASSACHUSETTS.

Welch v. *Swasey*, 193 Mass. 364, 214 U. S. 91. (Height regulation.)

Opinion of Justices, 234 Mass. 597.

Building Inspector of Lowell v. *Stoklosa*, 250 Mass. 52, 145 N. E. R. 262 (1924). (Store in industrial district.)

Brett v. *Building Inspr. of Brookline*, 250 Mass. 73, 145 N. E. R. 269 (1924). (Apartment house in single-family district.)

Bradley v. *Board of Zoning Adjustment of Boston* (S. C. Mass. 1926), 150 N. E. R. 892.

Spector v. *Building Inspr. of Milton* (1924), 250 Mass. 63, 145 N. E. R. 265. (Stores in residential district.)

MINNESOTA.

State, ex rel. Beery, v. *Houghton, Inspector* (Supreme Court of Minnesota, July, 1925), 204 N. W. R. 569. (Apartment in single-family district.)

NEW YORK.

Lincoln Trust Co. v. *Williams Bldg. Corp.,* 229 N. Y. 313. (Store in residential district.)

Matter of Wulfsohn v. *Burden,* 241 N. Y. 288, 150 N. E. R. 120. (November 24, 1925, affirming Supreme Court, App. Div., 1925.) (Apartment house in single-family district and set-backs.)

Cohen v. *Rosedale Realty Co.,* 199 N. Y. Supp. 4; and *People, ex rel. Rosedale Realty Co.,* v. *Kleinert,* 237 N. Y. 580, an affirmance without report of decisions of the Supreme Court and Supreme Court, Appellate Division. (Apartment house in single-family district.)

Headley v. *Fennell,* Supreme Ct. of N. Y., App. Div., 124 Misc. 886, 210 N. Y. Supp. 102. (Apartment house in single-family district.)

In re Cherry, 193 N. Y. Supp. 57, 196 N. Y. Supp. 920, 234 N. Y. 607.

Matter of McGarry v. *Walsh* (Supreme Court, Appellate Division), 210 N. Y. Supp. 286.

Palmer v. *Mann,* 198 N. Y. Supp. 548, 201 N. Y. Supp. 525. (Height regulation.)

People, ex rel. Werner, v. *Walsh,* 209 N. Y. Supp. 454, 212 App. Div. 635. (Garages in business district.)

OHIO.

Pritz v. *Messer* (Supreme Court of Ohio, May 19, 1925), 112 O. S. 628, 149 N. E. 30. (Area regulations of apartment house.)

State, ex rel. Dantzig, v. *Durant* (Ohio Court of Appeals, Vol. XXI Ohio Law Bulletin and Reporter

395, Jan. 14, 1924 number.) (Apartment in single-family district.)

OREGON.

Kroner v. *City of Portland*, 240 Pac. R. 536. (Supreme Court of Oregon, December, 1925.) (Creamery in residential district.)

RHODE ISLAND

City of Providence v. *Stephens* (Supreme Court of Rhode Island, June 11, 1926) 133 Atl. Rep. 614. (Apartment house in more restricted residential district.)

WISCONSIN.

Holzbauer v. *Ritter*, 184 Wis. 35, 198 N. W. R. 852 (1924). (Stores in residential district.)

State, ex rel. Carter, v. *Harper, Bldg. Inspector of Milwaukee* (1923), 182 Wis. 148, 196 N. W. 451. (Wholesale and retail business in residential district.)

Favorable Decisions of Inferior Courts.

ALABAMA.

Standard Oil Co. v. *Commissioners of Montgomery* (Circuit Court, Alabama, 1925). (Filling station in residential district.)

COLORADO.

Milton v. *Azpell* (District Court, Colorado, August, 1925). (Store in residential district), and *Wills* v. *Board of Adjustment of Denver* (District Court, Colorado, October, 1925). (Brickyard adjoining an existing brickyard in a residential district.)

CONNECTICUT.

City of Hartford v. *Katz* (Superior Court, Connecticut, 1925). (Filling station in residential district.)

DISTRICT OF COLUMBIA.

U. S., ex rel. Stearman, v. *Oehmann,* Supreme Court, District of Columbia, July 6, 1925. (Exclusion of stores from residential district. Zoning ordinance of Washington.)

NEW JERSEY.

Hench v. *City of East Orange,* 130 Atl. R. 363.

Schait v. *Senior,* 97 N. J. L. 390, 117 Atl. R. 517.

NEW YORK.

In re Collins (N. Y. Supreme Court, May, 1925), 211 N. Y. Supp. 437. (Laundry in residential district.)

People, ex rel. Stevens, v. *Clark,* 213 N. Y. Supp. 350. (Supreme Court, 1925.) (Apartment house area and bulk regulations.)

NORTH DAKOTA.

City of Bismarck v. *Hughes* (District Court, North Dakota, 1925). (Apartment house in single-family district.)

OHIO.

People, ex rel. Morris, v. *Osborn,* 22 Ohio N. P. (N.S.) 549, 51 Ohio Decisions 98, 197. (Apartment in single-family district.)

Santangelo v. *Cincinnati,* 25 Ohio N. P. (N.S.) 49 Ohio Law Bulletin and Reporter, Aug. 11, 1924. (Stores in residential district.)

PENNSYLVANIA.

Appeal of Armstrong. (Common Pleas Court of Allegheny County, Pa.) (Semi-nuisance industry.)

In re American Reduction Co., 72 Pittsburgh Legal Journal 321, 326. (Nuisance industry.)

TENNESSEE.

City of Memphis v. *Spencer-Sturla Co.* (Circuit Court of Shelby County, Tennessee.) (Funeral home in residential district.)

Adverse Decisions in Highest and Appellate State Courts.

CALIFORNIA.

Ex parte White (Cal. App.), 234 Pac. R. 396. (Court upheld validity of zoning, but declared particular ordinance invalid because of unreasonably restricted size of business district.)

DELAWARE.

City of Wilmington v. *Turk*, Del. Ch., 1925, 129 Atl. 512. (Exclusion of nurses' private hospital in a residence zone.)

GEORGIA.

Smith v. *City of Atlanta.* (Supreme Court of Georgia, 1926) 161 Ga. —, 132 S. E. Rep. 66. (Stores in residential district.)

Morrow v. *City of Atlanta* (Supreme Court of Georgia, May 13, 1926) 133 S. E. Rep. 345. (Tire repair shop in residential district.)

MARYLAND.

Goldman v. *Crowther*, Court of Appeals of Maryland (1925), 147 Md. 282, 128 Atl. R. 50. (Store in residential district.) (See able dissenting opinion.)

MISSOURI.

State, ex rel. Penrose Inv. Co., v. *McKelvey; City of St. Louis* v. *Evraiff*, and *State, ex rel. Better home Co.*, v. *McKelvey* (1923), 301 Mo. 1, 231, 130; 256 S. W. R. 474, 489, 495 (three cases arising from the St. Louis ordinance. Junk yard and industries in business district. Able dissenting opinion. Missouri had no zoning enabling statute and in the opinions questions of statutory power were mixed with constitutional questions.)

NEBRASKA.

State, ex rel. Westminster Church, v. *Edgecomb,* 108 Nebr. 859. (Involved one of the area restrictions only, without passing upon validity of zoning and case has not been interpreted in Nebraska as invalidating zoning.)

NEW JERSEY.

State, ex rel. Ignacunias, v. *Risley* (1923), 98 N. J. L. 712, 121 Atl. R. 783, affirmed in 125 Atl. R. 121. (Stores and apartment houses in double-family residential district.) (This is known as *Nutley* case and is the leading New Jersey case. New Jersey municipalities seem to have kept on enforcing zoning ordinances, with the result that on the authority of the *Nutley* decision a large number of adverse decisions, cited below, have been rendered by inferior New Jersey courts.)

The Court of Error and Appeals affirmed its position in

Krumgold v. *Mayor* (1925), 130 Atl. R. 635. (Stores in residential district), and

Ingersoll v. *South Orange* (1925), 130 Atl. R. 721, affirming 126 Atl. R. 213, 128 Atl. R. 393. (Apartment house in single-family district.)

Adverse Decisions in Inferior Courts.

NEW JERSEY.

Numerous decisions of Supreme Court of New Jersey in 1924 and 1925 based on above cited *Nutley* case: *Huppert* v. *Jersey City; King* v. *Bldg. Insp. of Lydnhurst; Plymouth Co.* v. *Newark; R. & B. Realty Co.* v. *Passaic; White* v. *Ridgefield; Eaton* v. *Village of South Orange; Heller* v. *Village of South Orange; Kantorowitz* v. *Bigelow; Williams* v. *Gage,* 130 Atl. R. 362, 364, 365, 366, 534, 721, 811; *Becker* v. *Dowling, Falco* v. *Kalterbach, Inspr. of Bldgs. of City of Elizabeth; Sarg* v. *Hooper; State, ex rel. Losick,* v. *Binda, Bldg. Inspr. of Township of Weehawken; State, ex rel.*

Nelson Bldg. Co., v. *Binda, Inspr. of Bldgs. of Township of Weehawken; Union County Development Co.* v. *Kaltenbach, Bldg. Inspr. of Elizabeth*, 128 Atl. Rep. 376, 394, 395, 396, 618, 619; *State, ex rel. Jersey Land Co.*, v. *Scott*, 126 Atl. R. 173; *Prince* v. *Board of Montclair*, 129 Atl. R. 123. (These decisions are concerned with exclusions respectfully of stores, filling stations, stables from residential districts and apartment houses from single-family districts.)

OHIO.

State, ex rel. Ball, v. *Harris*, Common Pleas Court of Trumbull County, 1926. (Set-back provisions in residential district.)

PENNSYLVANIA.

Appeal of White from Board of Appeals of Pittsburgh, Superior Court, Western Dist., Pennsylvania, July 9, 1925. (Invalidated set-back provisions based on set-backs of existing buildings.)

It will be noted from the above citations that the strong weight of authority, both in the highest and appellate courts and in courts of first instance, is in favor of the constitutionality of zoning; favorable decisions having been rendered by the highest courts of New York, Louisiana, California, Wisconsin, Massachusetts, Kansas, Ohio, Minnesota, Illinois, Rhode Island and Oregon, as against adverse decisions in Missouri, New Jersey, Maryland, Georgia and perhaps Delaware.

General discussions of the subject and citations will be found in the following articles: Constitutionality of Zoning, by Alfred Bettman, 37 Harvard Law Review 834; Constitutionality of Zoning Laws, by Newman F. Baker, 20 Illinois Law Review 213 (November, 1925); City Planning and Restrictions on Property, by J. S. Young, 9 Minnesota Law Review 593 (June, 1925).

ANALOGIES WITH OTHER TYPES OF REGULATION OF PROPERTY.

Zoning has Same Fundamental Purposes and Justification as All Other Property Regulation, Including Law of Nuisances; but Zoning is not Mere Suppression of Nuisance; it is Constructive Planning for Prevention of Developments Detrimental to Public Health, Convenience, Safety, Morals and Welfare.

Zoning is simply a modern mode or application to modern urban conditions of recognized and sanctioned methods of regulating property in the interest of the public health, convenience, safety, morals and welfare. Zoning bears distinct analogies to the recognized and sanctioned modes of such regulation. The fallacy underlying much of the argument against zoning consists in treating the methods of the exercise of legislative power as fixed once and forever, and in declaring that whatever new evils may grow up in the community, the community is impotent if it can not deal with the evil with exactly the same devices as those with which it dealt with other evils fifty or a hundred years ago. The analogous modes of regulation point the way, but can never fix the constitutional limitations; otherwise law would remain unchangeable and impotent.

What, for example, is the relationship of zoning to the law of nuisances? The term "nuisance" is usually applied to those developments which are offensive in the most crude and obvious way, in which cause and effect are not only quite obvious to the naked ear or nose, but are also not far apart in either space or time. A slaughter house or foundry next door to a residence, throwing its odors or clanging noises into that residence over an intervening space of a few feet, is a nuisance. The law of nuisance, however, has precepts and a philosophy, as well as illustrations. The philosophy underlying the above illustration is nothing more or less than the old adage that a man shall not so use his property as to injure another; and the precept, that a man may not send noise or odor or other dis-

turbing substances or vibration into or onto his neighbor's property. The law of nuisance operates by way of prevention as well as by suppression. The zoning ordinance, by segregating the industrial districts from the residential districts, aims to produce, by a process of prevention applied over the whole territory of the city throughout an extensive period of time, the segregation of the noises and odors and turmoils necessarily incident to the operation of industry from those sections of the city in which the homes of the people are or may be appropriately located. The mode of regulation may be new; but the purpose and the fundamental justification are the same. If, as is the case, one of the aims of zoning be to segregate industrial and commercial street traffic from the lighter and quieter forms of street traffic, by means of the segregation of the districts in which these different types of traffic normally develop, then zoning becomes obviously a mode of prevention of noise and dangers. Experience demonstrates that unregulated city growth tends to subject the home districts to offensive environment; and not much imagination is needed to realize that zoning can counteract this tendency.

The law concerning highway obstruction furnishes another analogy. The owner of property abutting on a street may be forbidden to place a permanent or temporary obstruction across the sidewalk. The owner of a skyscraper might be held, without going beyond the bounds of reason, to contribute more than his fair share of street obstruction, by the stream of pedestrians and vehicles which he draws to or pours out from his property. The law may and does prohibit the abutting property owner from staging an attractive entertainment in his show window, such as would tend to draw a crowd to that part of the street. The very number of persons or vehicles drawn to a section of the street by the high buildings located along it may be equally obstructive. Limitations of height or of other forms of building intensity have an obvious relationship to freedom of movement on the highway and to traffic control.

The regulation of intensity of building development, as a means of preventing excessive gathering of human beings within a designated space, is a recognized mode of constitutional exercise of the police power. Tenement house and factory regulations specify standard minima of space per capita of occupant or operative. Analogously, the zone plan measures the territory of the city available for development, estimates the number of human beings who will live and work within the territory during the period of the life of the ordinance, gathers the topographic, economic and social facts of the territory, and, applying recognized principles of health, safety, economic prosperity and convenience to these data, determines such distribution of future residential, business, industrial and public structures and such standards of bulk and height of buildings as will moderate unwholesome and inconvenient congestion during the process of the growth of the city's population, business and industry. Zoning is an application to the whole territory of the community of the same basic motives and principles as justify, in the constitutional sense, the right to regulate congestion within the space of an individual piece of property or plant. Building laws specify standards of sunlight within the workshop or apartment. Building height limitation is designed, among other results, to regulate the amount of darkness which one building may throw into adjacent buildings or those across the street.

The limits of this brief do not permit an exhaustive indication of all the analogies of zoning ordinances to sanctioned modes of property regulation. The above will serve as sufficient illustrations. Perhaps another analogy might be referred to in passing, and that is the recognized power to enforce co-operation upon members of a group similarly situated, for the direct benefit of all of the group, with indirect benefit to the general public. The classic case is that of the enforced joint guarantee of bank deposits, *Noble State Bank* v. *Haskell*, 219 U. S. 104, where the principle is expressed:

> "It would seem that there may be other cases beside the everyday one of taxation in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume."

In the case of a zone plan, each piece of property pays, in the shape of reasonable regulation of its use, for the protection which the plan gives to all property lying within its boundaries. As stated in *State, ex rel. Carter,* v. *Harper,* 182 Wis. 148, a zoning case:

> "Except in cases of nuisance, there is a reciprocity of benefits resulting from limitations imposed upon the use of property by general laws. He who is limited in the use of his property finds compensation therefor in the benefits accruing to him from the like limitations imposed upon his neighbor."

These analogies have been sufficiently discussed to show that zoning represents no radically new type of property regulation, but merely a new application of sanctioned traditional methods for sanctioned traditional purposes.

Though zoning and, in truth, all property regulation has the same fundamental basis as the law against nuisances, neither zoning nor property regulation in general is restricted to or identical with nuisance regulation. Any attempt to reduce the constitutional law of property regulation down to the law of nuisances, fails to regard the principle so well expressed in *Bacon* v. *Walker,* 204 U. S. 311, where this Court said:

> "It (the police power) is not confined to the suppression of what is offensive, disorderly or unsanitary. * * * It extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people."

In other words, the police power acts not only suppressively, but also constructively for the promotion of the

public welfare.[1] As stated in Freund on Police Power, Section 29:

> "The common law of nuisance deals with nearly all the more serious and flagrant violations of the interests which the police power protects, but it deals with evils only after they have come into existence, and it leaves the determination of what is evil very largely to the particular circumstance of each case. The police power endeavors to prevent evil by checking the tendency toward it and it seeks to place a margin of safety between that which is permitted and that which is sure to lead to injury or loss. This can be accomplished to some extent by establishing positive standards and limitations which must be observed, although to step beyond them would not necessarily create a nuisance at common law."

That is just what a zoning ordinance does, namely, establishes standards and limitations of building use, height, and lot occupancy for the prevention of tendencies which, if permitted to develop, will have a detrimental effect upon the public health, safety, convenience, morals and welfare. In fact, the need of zoning has arisen to a considerable degree from the inadequacy of the technical law of nuisance to cope with the problems of contemporary municipal growth. Municipal councils are bombarded daily with pressure to prevent this or that proposed development, such as a public garage or filling station or industrial plant, which the neighbors dislike, and in the past attempted to meet such situations by block ordinances which, by reason of their attempt to protect selected neighborhoods or keep out selected types of proposed uses, may contain an element of arbitrariness and injustice. Such cases and enactments, coming before the courts from time to time, have produced such an elasticity of definition as to what is or may be declared a nuisance, that the term has ceased to have any definite meaning as a measure of legislative

[1] The above passages of this brief pp. 23 to 27 have been taken almost verbatim from the article "Constitutionality of Zoning" by the author of this brief in Harvard Law Review, May, 1924.

power. The decisions upon the definition of nuisance have become utterly irreconcilable. In *Ex Parte Quong Wo*, 161 Cal. 220, dealing with the exclusion of a laundry from a residential area, the Supreme Court of California justified the exclusion upon the principle that a laundry is "of such a nature that it may be confined in the lawful exercise of the police power within definite limits of a city," which is equal to saying that a use may be excluded if it be of a kind which may be excluded. A lawyer would often hardly hazard a guess as to whether his client's proposed industry will or will not be declared a nuisance. There is something manifestly unfair in requiring the owner of an industry to select and pay for his site, design his plant and even build before he can obtain any degree of assurance that he will be permitted to operate. The zone plan, by comprehensively districting the whole territory of the city and giving ample space and appropriate territory for each type of use, is decidedly more just, intelligent and reasonable than the system, if system it can be called, of spotty ordinances and uncertain litigations about the definition of a nuisance. Certainly the constitutional scope of the police power is not limited to the common-law of nuisances.

ZONING IS NOT FOR AESTHETIC PURPOSES.

The Charge of Aesthetic Motives Represents a Confusion Between Considerations of Taste and Beauty and Considerations of Orderliness, Cleanliness, Quiet and Healthfulness of Environment.

Appellee's attorneys constantly refer to aesthetic considerations and the promotion of beauty; seeking, apparently, to give the impression that the promotion of aesthetic values is the chief purpose of the creation of residential districts, and that this is something to be condemned or at least something which transcends constitutional powers. This Court has held, that if a measure finds its justification in considerations of health, convenience, safety, morals or

welfare, the presence of an aesthetic ingredient in the legislative purpose would not destroy the validity of the measure. See *Welch* v. *Swasey, supra; St. Louis Poster Advertising Co.* v. *City of St. Louis,* 249 U. S. 269. On this phase of the issues, we might rest our argument on this principle and admit that zoning ordinances, in addition to health, safety, convenience, morals and welfare, aim to improve the appearance of cities. Any such admission, however, would, in our opinion, contain a fallacious interpretation of the meaning of "aesthetic" in constitutional law, a term which has not as yet received any definite or authoritative interpretation. Zoning does aim to improve the good order of the cities, that is the general orderliness, which is perhaps, what appellee's attorneys have in mind. That is, however, something quite different from the artistic or the beautiful. An artist might prefer the slovenly streets of Naples to the neat American suburb. The essential object of promoting what might be called orderliness in the lay-out of cities is not the satisfaction of taste or aesthetic desires, but rather the promotion of those beneficial effects upon health and morals which come from living in orderly and decent surroundings. When we put the furnace in the cellar rather than in the living room, we are not actuated so much by dictates of good taste or aesthetic standards, as by the conviction that the living room will be a healthier place in which to live and the house a more generally healthful place if the furnace and the gas range and the shop, if there be one, and the other industrial, so to speak, features of the house are kept out of the living room and the sleeping rooms and the dining room. Similarly, the man who seeks to place the home for his children in an orderly neighborhood, with some open space and light and fresh air and quiet, is not motivated so much by considerations of taste or beauty as by the assumption that his children are likely to grow mentally, physically and morally more healthful in such a neighborhood than in a disorderly, noisy, slovenly, blighted and slum-like district. This assumption is indubitably correct. The researches of physicians and public

health students have demonstrated the importance of our physical environment as a factor in our physical health, mental sanity and moral strength; and the records of hospitals and criminal courts amply support these conclusions. The comparative health statistics of the planned and unplanned communities, so far as same have been gathered, tend to shew more favorable results in the former than in the latter. Disorderliness in the environment has as detrimental an effect upon health and character as disorderliness within the house itself. The individual can control the conditions inside of his house; but except in the case of the rarely wealthy individual who can afford to buy large open spaces owned and controlled by himself, it is the community and the community alone which can furnish the necessary environmental protection. Besides, the conditions outside the house affect the conditions within the house, as for instance the noise of industrial traffic affects the living conditions within the house, and the light and air conditions outside largely govern the light and air conditions inside. Zoning has, amongst others, this purpose of promoting public health, order, safety, convenience and morals by the promotion of favorable environmental conditions in which people live and work; which is something very different from aesthetic in the sense of pleasing to the eye or satisfying to artistic cravings.

GENERAL PRINCIPLES OF CONSTITUTIONAL LAW AND POLICE POWER.

It is hardly necessary to enter into extensive definitions of the police power or to repeat the standard quotations concerning its scope. As is well known, the police power is the whole reserve power of the community to legislate concerning persons and things in the interest of the promotion of the public health, the public morals, the public safety, the public convenience, the public order, the public prosperity and the general welfare. Police power is in truth little else than the whole legislative power except

those specific types of power which have names and definitions of their own, such as taxing power and eminent domain. Necessarily the police power is coextensive with the public needs. Like every other legislative power, it is subject to constitutional limitations. Accurately speaking, the power does not grow; for it is always complete. New public needs, new situations necessitate new methods, new legislative devices; as, for instance, American urban conditions present problems so different from the problems of early pioneer rural life, that new types of measures become necessary to solve them.

There are certain well-known fundamental principles of the application and procedure of constitutional law which need be stated in only the most general way and for which no citation of authorities is required. The acts of a legislative body are presumed to be constitutional, and he who attacks the validity has the burden of establishing his case. All doubts are resolved in favor of constitutionality, for courts do not declare laws unconstitutional unless convinced beyond all reasonable doubts. The Home Rule clause of the Ohio Constitution grants police powers to cities, so that a municipal ordinance of a charter city, limited to the territory of that city, has all the constitutional standing of a state statute and the tests of constitutionality are the same as those of a state statute. Reasonableness means the absence of arbitrariness, that is, the honest exercise of intelligence, that is, that the measure can represent the decision of an intelligent legislator, honestly aiming to promote the public health, etc. If reasonableness depends on circumstances, such circumstances are presumed to exist, and he who attacks an ordinance as unreasonable has the burden of demonstrating that the circumstances do not exist.

RELATIONSHIP OF ZONING TO THE PUBLIC HEALTH, SAFETY, CONVENIENCE, MORALS AND GENERAL WELFARE DEMONSTRATED BY THE EXPERIENCE OF AMERICAN CITIES AND CONCLUSIONS OF PERSONS QUALIFIED UPON THESE SUBJECTS.

We come then to the application of these general principles of police power and constitutional law. What are the needs which zoning is designed to meet and its appropriateness or reasonableness as a means of meeting these needs? Zoning is based upon a thorough and comprehensive study of the developments of modern American cities, with full consideration of economic factors of municipal growth, as well as the social factors. Volumes have been written on the needs, the technique and methods with which these needs are met and the factors of the problem. We have space here for only a short outline, with reference to a few points as illustrations; and we respectfully ask the Court to consider them simply as a few illustrations. A full discussion or a reading of the literature on the subject would demonstrate that zoning takes into account both economic and social factors of modern urban conditions and is most intimately and substantially related to and promotive of every phase of public health, public safety, public convenience, public order, public prosperity, public morals and general welfare.

Every one admits that the home and housing conditions bear an intimate relationship to health. "Own your own home" is a slogan based on this realization of the advantages, in the way of health, which come from the home which has a surrounding or environment of sunlight, air, quiet, and cleanliness. Parents prefer to bring up children in such environment, not for any snobbish or aesthetic reasons, but because it promotes the health, mental, moral and physical, of the children.

What happens in American cities is this: American urban communities grow quickly. New business and industrial plants are established and located with great frequency. Stores or industrial plants are, with considerable frequency, placed in residential neighborhoods, not always because of any imperative economic necessity for such location, but often by reason of all sorts of whims, accidents, mistaken judgments. The neighborhood immediately declines as a residential district. Those financially able to do so move further out, thus extending the residential territory which has to be served by water, gas and other public utilities, placing an added drain upon and increasing the cost of the community's transportation, street, light and other utility service. The store or factory bring business and industrial traffic, which is larger, noisier and more dangerous than the purely residential traffic. If the store or factory be simply the vanguard of a logically located business or factory district, then the district may develop promptly as a business or industrial district. But more often the locating of the store or factory in this district was a mistake or very premature or there are conditions not conducive to its upbuilding as a business or industrial area. So it declines as a residential area and does not upbuild as a business or industrial area. Land values become demoralized; the standard of living goes down. The district becomes a blighted district representing an economic loss to the community, the premature and unnecessary destruction of a healthful home district, the beginnings of a slum or mixed slum and industrial territory; in fact, all of the less healthful instead of more healthful urban conditions are speedily produced in that area. Every growing American city has these doleful and sordid and unhealthful evidences of this unnecessary and wasteful destruction of home districts by non-residential invasions.

As recently stated by Secretary Hoover in a letter to the President of the National Conference on City Planning:

> "The fact is constantly brought before me as Secretary of Commerce that lack of city planning and zoning constantly hampers commerce and industry in their basic function of serving mankind. This is particularly true in connection with housing and general living conditions, while the waste and inefficiency in transportation, and losses through bad location of structures are a constant drag on our resources, and tend to retard increases in living standards."

Gradually all areas except those protected by private restrictions (these being generally limited to newer and high-priced subdivisions) become a heterogeneous mixture of business, industrial and residential developments. This mixture places an added drain upon the police and fire departments of the community, since it takes more resources in the way of policing and fire prevention where uses of property are mixed than where they are segregated to some degree. Crime and vice increase in the blighted districts whose general conditions are more promotive of sickness and delinquency. Fewer and fewer streets are immune from the noises and dangers of business and industrial traffic. The unhygenic, unsafe, wasteful, costly and inconvenient conditions due to slums, blighted districts, congestion, spotty development of the growing but unplanned city grow constantly more and more beyond the community's capacity to cope with them.

What is an appropriate and reasonable means for preventing the growth of these evils? Obviously it is to preserve for residential purposes territory which, by reason of land values and topographic conditions and residential utilties, is appropriate for home uses, until the time arises when, by virtue of changes in land values or modes of transportation or the pressure of business and industry, the time shall have arrived when appropriately the residential areas should be moved elsewhere. By this means

the healthful environment of the city's homes is protected, By this means, also, the building of homes is promoted; for residential land values are stabilized and those who finance residential construction have a security for their investment which causes them to be willing to finance more home construction. The working man, with his savings, and others, with their capital available for homes, are encouraged to build homes, because the healthful home environment receives the protection of the law. No person who believes in homes and healthful home surroundings can fail to believe in the stabilized residential environment.

Municipalities, however, do not exist or thrive solely for or by homes. Places of work, as well as of habitation, are necessary; also places of recreation and civic activities, and of educational and religious activities, all located so as to furnish convenient access to and from the residential areas and to and from each other. Each residential district, for instance, requires its neighborhood business center with its grocery store, drug store, branch bank, churches, schools. Therefore, in planning the districting, these local business and civic centers require to be allotted their appropriate territory, sufficiently close to the residential district to furnish convenience of access, sufficiently large to care for all the local civic and business needs of the estimated population of the neighborhood to which they are tributary, and with transportation and other utility conveniences taken into account and with economic factor of the land value given its proper force. Consequently these local business and civic areas, though segregated somewhat from the residential areas, are placed immediately adjoining to or in the center of the residential areas.

The city needs, also, its central business, civic, recreational, educational, institutions, its banks, department stores, theatres, large hotels, office buildings, central libraries, central schools and so on. In locating these districts convenience of access to residential areas and to the manu-

facturing districts, the economic factor of the land value appropriate to these central business and civic uses and numerous other factors are taken into account. The area devoted to these central business and civic purposes must be of sufficient extent to be adequate for the whole estimated population of the city in accordance with the development of the city's entire territory in accordance with the plan.

In the case of those communities which have or need industrial areas, that is, in which industry forms an appropriate part of the uses of property within the community, adequate space will be provided in the zone plan for the industrial developments. These areas need be so located as to give the necessary industrial facilities, railroads, traffic highways and others. The economic factor of the land values appropriate to industrial development is taken into account. The area devoted to industrial use is determined so as to give ample space for full industrial development of the growing community. In the industrial district industry is legalized, thus freeing it from the injunctions and other complaints of neighboring properties and stabilizing the investments in the industrial plants; all of which is promotive of prosperity. The street system can be adjusted to the districting, reducing the evils of mixed industrial and non-industrial traffic, thus promoting public convenience.

Similar considerations and factors and adjustments govern the location of railroad terminals and other utilities, parks and other recreational spaces and the other manifold activities of urban life.

Perhaps the above is sufficient to illustrate how the zone plan is one consistent whole, with parts adjusted to each other, carefully worked out on the basis of actual facts and tendencies, including actual economic factors, so as to secure development of all the territory within the city in such a way as to promote the public health, safety, convenience, order and general welfare. Zoning reaches real public needs, the needs of the modern growing American

urban community. It seeks to meet those needs by an appropriate and reasonable method. It represents the application of foresight and intelligence to the development of the community. If the plan be well made as a result of a careful survey, it is fair and just, for in exchange of the restrictions which it places on each piece of property, it places restrictions for each piece of property, that is for the benefit of each piece of property, and protects each piece of property, as well as gives to each piece of property its share of the general health, order, convenience, and security which the whole plan brings to the community. The area of the property which the individual himself owns represents the limit of protection which the individual can provide for himself, his property or his family or his business. The community alone, by means of a zone plan, can protect him and his family and his property and his business against the unwholesome, demoralizing and depreciating effects which his neighbors or other property owners may bring upon him, his property, his family or his business by the unregulated uses to which they put their properties.

In answer to the line of attack which seeks to deride the capacity of municipal councils to legislate wisely, it is sufficient to say that our constitutional system is not and can not be based upon the assumption of the stupidity or mediocrity of our legislative assemblies. On the contrary, the principle of the separation of powers requires the assumption that the legislature has sufficient intelligence to deal wisely with public needs, leaving to the courts the function of guarding against arbitrariness, insincerity, carelessness, capriciousness and discrimination. As stated by James Bradley Thayer, an outstandingly able lawyer, in his essay entitled, "The Origin and Scope of The American Doctrine of Constitutional Law," p. 23:

> "It must indeed be studiously remembered, in judicially applying such a test as this of what a legislature may reasonably think, that virtue, sense and competent

knowledge are always to be attributed to that body. The conduct of public affairs must always go forward upon conventions and assumptions of that sort. 'It is a postulate,' said Mr. Justice Gibson 'in the theory of our government * * * that the people are wise, virtuous and competent to manage their own affairs.' *Eakin* v. *Raub*, 12 S. & R. 355. 'It would be indecent in the extreme,' said Marshall, C. J., in *Fletcher* v. *Peck*, 6 Cr. 131, 'upon a private contract between two individuals to enter into an inquiry respecting the corruption of the sovereign power of the state.' And so in a court's revision of legislative acts, as in its revision of a jury's acts, it will always assume a duly instructed body; and the question is not merely what persons may naturally do who are such as we often see, in point of fact, in our legislative bodies, persons untaught it may be, indocile, thoughtless, reckless, incompetent—but what those other persons, competent, well-instructed, sagacious, attentive, intent only on public ends, fit to represent a self-governing people, such as our theory of government assumes to be carrying on our public affairs—what such persons may reasonably think or do, what is the permissible view of them."

Zoning requires no greater foresight or skill than many other tasks with which the legislative bodies are called upon to deal in the ordinary run of their work, such as health codes, building codes, food and drug acts, utility regulation, taxation. The necessary professional, technical and expert talent and experience are available to assist. A zoning ordinance, like any other measure, is subject to amendment to meet changing situations and developments. Compared to the folly which the experience of American cities has shown to be inherent in unregulated urban development, any conscientiously made zone plan is wisdom itself.

Nor does zoning interfere with private initiative, (except, of course, in the sense that all law, including the law against homicide, affects the field of individual choice). Quite

the contrary. While full statistics have not been collected, there has been sufficient observation of the quantities of building erected in various American cities to demonstrate beyond doubt, that the zoned cities compare most favorably with unzoned cities in the quantity of building construction for homes, stores and industries. The most elementary process of a priori reasoning will disclose that the protection and stability which zoning gives to investment in buildings will increase and promote the construction of homes and stores and industrial plants. That is one of its purposes and a purpose which it is certain to accomplish. In a book published in 1923 in Cleveland entitled, "City Growth and Values," with the express endorsement of The National Association of Real Estate Boards and written by Stanley L. McMichael, formerly secretary of the Cleveland Real Estate Board and active in the real estate business, and Robert F. Bingham, contains a chapter on zoning, which contains the following passages:

> "In principle the advisability of zoning of cities can scarcely be questioned. Different classes of business and industries are segregated to districts adapted to their needs. Apartments and double houses are alloted to other territories while areas for single houses are always provided. The desirability of zoning laws in suburbs of large cities seems to be proven by the experience of many home communities where it has been tried. Retail business, manufacturing and nuisances are not allowed to creep into residential districts, destroying home values and undermining the elements of permanency and exclusiveness, which make residential districts desirable. * * * Insofar as this discussion is concerned the two questions of interest are:
>
> Does zoning help or hinder a city's growth?
>
> Does zoning increase or lower real estate values?
>
> The first question may be answered by the statement that the growth of those cities in which zoning has been

effective has not been, apparently, checked in any degree. The right of a city to place certain restrictive measures upon the privileges of owners to use their property is one which public policy should, to a great extent, control. If promiscuous growth is detrimental and orderly growth desirable, and a zoning law accomplishes the latter object, then it seems that zoning, properly applied, would be beneficial rather than detrimental to any growing community. Selfishness on the part of a property owner who is determined to use his land for whatever purpose he chooses, should not prevent the accomplishment of a zoning plan, if the general interest of the community is thereby advanced. In the long run he is likely to fare quite as well under a zoning law and realize just as much from his property. * * *

With reference to the problem as to whether zoning raises or lowers real estate values, it is difficult to believe that such a law, in its general application, can do other than raise values throughout an entire community, although in specific instances it may curtail the ambitions of property owners who hold lots near or in restricted sections who wish to use their land for a widely different purpose from that of the general neighborhood. Public welfare is paramount and the wishes of a few individuals to realize more from the sale or use of their properties for uses foreign to the character of the neighborhood should not interfere with the general application of that principle.

It is significant that in cities where zoning laws have been made effective there has been great real estate activity in certain sections. Home neighborhoods which had no protection from business encroachment have taken a sudden spurt and have built up rapidly as soon as it was apparent that only residences were to be allowed therein. Likewise, as soon as certain streets were designated as business thoroughfares thus creating a limited amount of business property to be allotted to each section of the city such streets were bound to become, sooner or later, important retail arteries, restricted permanently for that use."

There is no tenable political philosophy, however much it may stress the virtues of private and warn against public action, but admits the need of public action when the nature of the problem is such that private action can not cope with it; and as we have seen, the protections which zoning afford in the modern urban community are not within the power of the individual (with few exceptions) to obtain for himself, his family, his business, his industry. Consequently, the protection afforded by the community frees his individual initiative to undertake the things that do lie within his power. The private land and building development of cities would be self-destructive, if the community did not furnish health, safety, convenience and moral facilities and regulation. The Constitution of the United States, certainly, has not incorporated into itself any such political philosophy as deprives us of the community's help in warding off or reducing those great impairments of health, convenience, safety, morals, and prosperity which both experience and the social sciences show to result inevitably from unregulated urban development.

Enough has been stated to indicate that zoning meets actual public needs growing out of modern American urban conditions, that its purpose is to promote the health, safety, convenience, order, prosperity and welfare of urban communities, that it is an intelligent, reasonable means of promoting these goods. In the course of the zoning movement, there has been gathered a large mass of testimony of qualified persons upon the relationship of zoning to the advancement of the public health, convenience, safety, morals, prosperity and welfare. Public health experts, such as health officers of various cities, academies of medicine, practicing physicians, sanitary engineers, have testified that by means of districting, conditions can be produced in both residential and non-residential districts which will promote the public health and reduce the evils of unregulated urban growth. Experts on convenience, such as heads

of traffic police departments and street traffic experts, have testified to the reduction or avoidance of congestion which will be produced by zoning. Safety experts, such as chiefs of fire and police departments, accident insurance actuaries, experts of fire prevention bureaus, have testified to the increase of public safety which will be brought about by means of traffic segregation and reduction of congestion resulting from zoning. Building association authorities, heads of mortgage companies, life insurance companies and other financial institutions, have testified to the promotion of home building that will be effected by zoning. Judges of juvenile courts and probation officers have testified to the reduction of crime and juvenile delinquency which will be afforded by the protection of residential areas and the prevention of the blighted districts. Bankers have testified to the promotion of public prosperity by the protection afforded to investments in building developments. City engineers have testified to the beneficial effects of zoning on public convenience by means of the better street and transportation systems which can be afforded in the zoned community. For years the National Housing Association has devoted a considerable percentage of its programs and energies to promoting zoning as an essential factor in the solution of the housing problem. The United States Department of Commerce, as a part of its program for improving housing conditions in this country, has created a zoning bureau, which has distributed model zoning enabling statutes similar to the Ohio law and literature promotive of zoning. Engineering colleges have established courses to train up the necessary technical and professional talent.

In addition to the numerous books by students or practitioners of city planning, many references to periodicals, city plan reports and legislative hearings could be supplied. As an appendix to this brief, we have selected a few illustrative documents, namely: Paper on "Zoning and Health," by George C. Whipple, Professor of Sanitary

Engineering of Harvard University, read at the meeting of the City Planning Division of the American Society of Civil Engineers at Detroit, Michigan, in 1924. (Appendix, page 63.) Professor Whipple was probably the leading sanitary engineer in the United States and one of our leading authorities on public health. His essay will be found interesting and convincing. It demonstrates beyond any question that zoning has a very substantial relation to the promotion of public health in urban communities. Also:

On relation of zoning to public health:

Statement of Dr. William H. Peters, Health Commissioner of Cincinnati, to City Council of Cincinnati. (Appendix, page 77.)

Statement of David I. Wolfstein, a leading neurologist of Cincinnati, to City Council of Cincinnati. (Appendix, page 79.)

Report to City Council of Cincinnati of Committee on Public Health and Social Service of the Cincinnati Academy of Medicine. (Appendix, page 82.)

Report to City Council of Cincinnati of the Public Health Federation of Cincinnati. (Appendix, page 86.)

Extracts from Statement of Dr. John Dill Robertson, Commissioner of Health of the City of Chicago. (Appendix, page 91.)

Extracts from Report of New York City Commission on Building Districts and Restrictions on Effects of Congestion. (Appendix, page 92.)

Extracts from Statements of Dr. William A. Evans, Health Commissioner of Chicago, published in "Studies on Building Height Limitations," by Chicago Real Estate Board. (Appendix, page 94.)

Extracts from Statement of Dr. M. A. Bliss, a leading neurologist of St. Louis, published in "Zone Plan," by City Planning Commission (p. 62), 1919. (Appendix, page 95.)

On relation to public morals:

Statement of Hon. C. W. Hoffman, Judge of Juvenile Court. (Appendix, page 96.)

On relation to public convenience and safety:

Extracts from Report of Committee on City Planning and Zoning of National Street and Highway Safety Conference, 1924, called by Secretary Hoover. (Appendix, page 97.)

Extracts from the Conclusions adopted by said Conference. (Appendix, page 98.)

Extracts from "Influences of Zoning on the Design of Transportation Services," by J. Rowland Bibbins, a leading engineer of Washington, D. C., before American Society of Civil Engineers. (Appendix, page 100.)

Extracts from "Some Aspects of the Automobile Industry," by Alvan Macauley, President of Packard Motor Company. (Appendix, page 101.)

Extracts from "City Planning as a Permanent Solution of the Traffic Problem," by Morris Knowles, a leading engineer of Pittsburgh. (Appendix, page 102.)

Extracts from "The City, Its Past and Its Future," by Raymond Unwin of the British Ministry of Health." (Appendix, page 104.)

Extracts from Memorandum on "Zoning in Built-Up Areas," prepared for London County Council by British Town Planning Institute. (Appendix, page 105.)

On relation to public safety:

Statement of Edmund Dwight, from New York, Manager of The Employers' Liability Insurance Corporation, on relation of zoning to safety on streets. (Appendix, page 106.)

Statement of John Kenlon, Chief of Fire Department of New York, on effects of height and bulk of buildings on fire hazards. (Appendix, page 107.)

From 1925 Fire Prevention Year Book, issued by Baltimore Underwriters and National Agent. (Appendix, page 108.)

On relation to housing, living conditions, recreation, general welfare and prosperity:

Extracts from "How Zoning Prevents Blighted Districts," by Edward M. Bassett, member of Department

of Commerce Advisory Committee. (Appendix, page 112.)

Leaflet on "City Zoning is Sound Business," by John Ihlder, Civic Department, Department of U. S. Chamber of Commerce. (Appendix, page 113.)

Statement by Bleecker Marquette, Executive Secretary of Better Housing League of Cincinnati. (Appendix, page 118.)

Extract from Statement of Raymond V. Ingersoll, Park Commissioner of New York. (Appendix, page 125.)

Extract from Statement of Clarence H. Kelsey, President of The Title Guarantee and Trust Company of New York. (Appendix, page 126.)

Extracts from article of George S. Edie, Vice-President of Westchester Trust Company of Yonkers, N. Y., entitled, "What the Banker Thinks of Zoning." (Appendix, page 127.)

Leaflet entitled, "Why Zone Our Town?" by John Ihlder, Manager of the Civic Development Department of the Chamber of Commerce of the United States. (Appendix, page 130.)

Extracts from "A Zoning Primer," issued by The Advisory Committee on Zoning of the United States Department of Commerce. (Appendix, page 133.)

Passages from "Elements of Land Economics," by Richard T. Ely and Edward W. Morehouse, Director of and Instructor in The Institute for Research in Land Economics and Public Utilities in the University of Wisconsin. (Appendix, page 135.)

These documents show convincingly that the nature of modern city life is such that with zoning general health is bound to be promoted; that without zoning the traffic problem becomes incurable, and with zoning it becomes, at least, subject to some effective control; that without zoning the safety of residential districts is lessened, with zoning that safety is promoted; that without zoning the risks of the depreciation of living conditions in residential neighborhoods are such that development of healthful housing conditions is retarded, whereas with zoning that development is promoted; that zoning stabilizes

land values and protects land in all portions of the community for the best uses of the land and that it protects and increases the aggregate prosperity represented by land values. Without zoning the growth of blighted districts and slum districts is unavoidable, and these in turn bring juvenile delinquency and vice due to deteriorated environment. With zoning, residential districts are protected against deterioration until appropriately needed for the progress of business and industrial growth.

In the light of even a slight or casual analysis of modern conditions of urban development, and in the light of the expressions of opinions by qualified students of the problems of public health, convenience, safety, morals and welfare, it is utterly impossible to find any tenable ground for any claim that, in the opinion of careful, honest, reasonable and intelligent legislators, zoning has not a substantial relation to or does not promote the public health, the public safety, public convenience and welfare and morals.

EXPRESSIONS OF COURTS UPON THE RELATIONSHIP OF ZONING TO THE PUBLIC HEALTH, SAFETY AND OTHER PUBLIC BENEFITS WITHIN THE SCOPE OF THE POLICE POWER

The courts which have passed upon zoning cases have plainly seen some, at least, of these phases of the relationship of zoning to the promotion of public health, safety and other public benefits which fall within the general classifications of the scope of the police power, and by way of illustration we give some quotations from the opinions of the courts which illustrate the judicial recognition of these relationships.

State, ex rel. Civello and others, v. *New Orleans*, 154 La. 271, 282, was a group of six cases, all on the New Orleans zoning ordinance, all involving the residential district regulations and arising out of the exclusions, respectively, of a grocery store, a fruit stand, an oyster counter, a filling sta-

tion and an ice factory. The group, therefore, involved every type of non-residential use, both business and industrial, with varying degrees of offensiveness or inoffensiveness. The state constitution expressly permitted zoning, so that the court's discussion was concerned with the federal constitution alone. The court upheld the ordinance in every one of the cases. In the course of its opinion the court said:

> "It is not necessary, for the validity of the ordinance in question, that we should deem the ordinances justified by considerations of public health, safety, comfort, or the general welfare. It is sufficient that the municipal council could reasonably have had such considerations in mind. If such considerations could have justified the ordinances, we must assume that they did justify them.
>
> "The attorneys for appellant have suggested considerations that might well have prompted the enactment of the ordinances in question. In the first place, the exclusion of business establishments from residence districts might enable the municipal government to give better police protection. Patrolmen's beats are larger, and therefore fewer, in residence neighborhoods than in business neighborhoods. A place of business in a resident neighborhood furnishes an excuse for any criminal to go into the neighborhood, where, otherwise, a stranger would be under the ban of suspicion. Besides, open shops invite loiterers and idlers to congregate; and the places of such congregation need police protection. In the second place, the zoning of a city into residence districts and commercial districts is a matter of economy in street paving. Heavy trucks, hauling freight to and from places of business in residence districts, require the city to maintain the same costly pavement in such districts that is required for business districts; whereas, in the residence districts, where business establishments are excluded, a cheaper pavement serves the purpose. It is pointed out, too, that the fire hazard is greater in the neighborhood of business establishments than it is in residence districts. A better and more expensive fire department—better equipment and younger and

stronger men—are needed in the business centers, where the buildings are taller, than in the residence districts.

"Aside from considerations of economic administration, in the matter of police and fire protection, street paving, etc., any business establishment is likely to be a genuine nuisance in a neighborhood of residences. Places of business are noisy; they are apt to be disturbing at night; some of them are malodorous; some are unsightly; some are apt to breed rats, mice, roaches, flies, ants, etc. Property brings a better price in a residence neighborhood where business establishments are excluded than in a residence neighborhood where an objectionable business is apt to be established at any time.

"If the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts."

State, ex rel. Carter, v. *Harper, Building Inspector of Milwaukee,* 182 Wis. 148, in which the Supreme Court of Wisconsin sustained the Milwaukee zoning ordinance, was an action in mandamus. The relator had a dairy and milk pasteurizing plant and desired to enlarge same. The proposed addition would violate the zoning ordinance and a permit was refused. The court upheld the ordinance. In the course of its opinion, p. 153, the court said:

"It is thoroughly established in this country that the rights preserved to the individual by these constitutional provisions are held in subordination to the rights of society. Although one owns property, he may not do with it as he pleases, any more than he may act in accordance with his personal desires. As the interest of society justifies restraints upon individual conduct, so also does it justify restraints upon the use to which

property may be devoted. It was not intended by these constitutional provisions to so far protect the individual in the use of his property as to enable him to use it to the detriment of society. By thus protecting individual rights, society did not part with the power to protect itself to promote its general well-being. Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare. If in the prosecution of governmental functions it becomes necessary to take private property, compensation must be made. But incidental damages to property resulting from governmental activities, or laws passed in the promotion of the public welfare, is not considerad a taking of the property for which compensation must be made. * * *

"Except in cases of nuisance, there is a reciprocity of benefits resulting from limitations imposed upon the use of property by general laws. He who is limited in the use of his property finds compensation therefor in the benefits accruing to him from the like limitations imposed upon his neighbor. * * *

"The purpose of the law is to bring about an orderly development of our cities; to establish residence districts into which business, commercial and industrial establishments shall not intrude, and to fix business districts and light industrial districts upon which heavy industrial concerns may not encroach. This is no new idea, although it has but recently taken the form of legislation. Every one who has observed the haphazard development of cities, the deterioration in the desirability of certain residential sections by the encroachment of business and industrial establishments upon and into such sections, resulting in the consequent destruction of property values and in the ultimate abandonment of such sections for residential purposes, has appreciated the desirability of regulating the growth and development of our urban communities. The home seeker shuns a section of a city devoted to industrialism and seeks a home at some distance from the business center. A common and natural instinct directs him to a section far removed from the commerce, trade and industry of the com-

munity. He does this because the home instinct craves fresh air, sunshine and well-kept lawns—home association beyond the noise of commercial marts and the dirt and smoke of industrial plants. Fresh air and sunshine adds to the happiness of the home and has a direct effect upon the well-being of the occupants. It is not uncommon to witness efforts of promoters to preserve the residential character of their additions by placing covenants in their deeds restricting the use of the property to residential purposes, and, in some instances, requiring the erection of a home according to specified standards. It can not be denied that a city systematically developed offers greater attractiveness to the home seeker than a city that is developed in a haphazard way. The one compares to the other about as a well ordered department store compares to a junk-shop. If such regulations stabilize the value of property, promote the permanency of desirable home surroundings, and if they add to the happiness and comfort of the citizens, they thereby promote the general welfare.

"When we reflect that one has always been required to so use his property as not to injure his neighbors, and that restrictions against the use of property in urban communities have increased with changing social standards, and that the luxuries of one decade become the necessities of another, can it be said that an offer to preserve various sections of a city from intrusion on the part of institutions that are offensive to and out of harmony with the use to which such sections are devoted, is unreasonable? The present standards of society prompt a revolt against such unbecoming intrusions, and they constitute such a recognized interference with the rights of the residents of such sections as to justify regulation.

"The benefits to be derived to cities adopting such regulations may be summarized as follows: They attract a desirable and assure a permanent citizenship; they foster pride in and attachment to the city; they promote happiness and contentment; they stabilize the use and value of property and promote the peace, tranquility and good order of the city. We do not hesitate to say that the attainment of these objects affords a

legitimate field for the exercise of the police power."

Opinion of the Justices of the Supreme Court of Massachusetts, 234 Mass. 597, was an advisory opinion upon a pending zoning enabling bill. The state constitution expressly authorized such legislation, so that the constitutional question was concerned solely with the federal constitution. The court in a most illuminating opinion pointed out the reasonableness and constitutionality of zoning as an exercise of police power, saying amongst other things:

"In the light of these principles declared by the Supreme Court of the United States, illumined by instances of their specific application, we are of opinion that the proposed statute can not be pronounced on its face contrary to any of the provisions of the federal constitution or its amendments. The segregation of manufacturing, commercial and mercantile business of various kinds to particular localities, when exercised with reason, may be thought to bear a rational relation to the health and safety of the community. We do not think it can be said that circumstances do not exist in connection with the ordinary operation of such kinds of business which increase the risk of fire and which renders life less secure to those living in homes in close proximity. Health and securing from injury of children and the old and feeble and otherwise less robust portion of the public well may be thought to be promoted by requiring that dwelling houses be separated from the territory devoted to trade and industry. The suppression and prevention of disorder, the extinguishment of fires and the enforcement of regulations for street traffic, and other ordinances designed rightly to promote the general welfare, may be facilitated by the establishment of zones or districts for business as distinguished from residence.

"Conversely, the actual health and safety of the community may be aided by excluding from areas devoted to residence the confusion and danger of fire, contagion and disorder, which in greater or less degree attach to the location of stores, shops and factories.

> Regular and efficient transportation of the breadwinners to and from places of labor may be expedited. Construction and repair of streets may be rendered easier and less expensive if heavy traffic is confined to specified streets by the business there carried on."

As will be noted from the list of cases given earlier in this brief, the Supreme Court of Massachusetts has now had occasion to pass upon three zoning ordinances in three litigated and contested cases and has upheld the ordinance in every case. In the case of *Building Inspector of Lowell* v. *Stoklosa*, 250 Mass. 52, involving exclusion of stores from residential zones, the court referred to its aforesaid advisory opinion, stating:

> "The reasons which now seem decisive and the supporting authorities are stated at length in the advisory opinion. It is hardly worth while to extend the bulk of our reports covering the same ground again. Without further present discussion, summarization, and amplification regarding the statement herein paraphrased, that opinion is adopted as the judgment of the court in the case at bar. It covers every constitutional phase which has been argued or which has occurred to us."

Amongst the most recent decisions is one by the Supreme Court of California rendered February 27, 1925 in *Miller* v. *Board of Public Works of Los Angeles*, 234 Pac. 381, upholding a zoning ordinance which created single-family home districts and excluded therefrom a four-family apartment building. The case is particularly pertinent in Ohio, because the authority of the California cities to enact zoning ordinances was expressly derived from the home rule provisions of the constitution of California, identical in wording with the Ohio constitutional provision, namely:

> "Any city may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

Every word of the opinion is pertinent here and informative and convincing, and we are tempted to copy the opinion in full, but for the sake of brevity, we are including only the following extracts, pp. 383ff:

"• • • In short, the police power, as such, is not confined within the narrow circumscription of precedents, resting upon past conditions which do not cover and control present-day conditions obviously calling for revised regulations to promote the health, safety, morals or general welfare of the public. That is to say, as a commonwealth develops politically, economically and socially, the police power likewise develops, within reason, to meet the changed and changing conditions. What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power.

• • •

"So thoroughly has the value of zoning been demonstrated that no longer is the constitutionality of the principle open to question. The books abound with cases upholding the constitutional right to zone and sanctioning the principles upon which that right is founded. In its original and primary sense zoning is simply the division of a city into districts and the prescription and application of different regulations in each district.

• • •

"It is conceded, as indeed it must be, by the opponents of the ordinance in controversy here that it is within the police power, by zoning, to banish nuisances and 'near-nuisances,' from certain districts. It is disputed, however, that the police power may be extended by any zoning ordinance, comprehensive or otherwise, to the regulation and isolation of vocations, business enterprises and residential uses which are not intrinsically obnoxious. A perusal of the decisions in California, which have upheld the prohibition and segregation of certain businesses by means of zoning, indicates that the court has not limited the power to zone to nuisances *per se* and has held that certain business establishments, harmless in themselves, may become 'near-nuisances' because of the character of the neigh-

borhood in which they are operating. In *Ex parte Quong Wo, supra,* the court justified the exclusion of a certain type of laundry from a residential district upon the theory that a laundry is 'of such a nature that it may be confined, in the lawful exercise of the police power, within defined limits in a city.' This is tantamount to saying that whenever the recognized purposes for which the police power may be called into play are subserved either by exclusion or segregation of any business, it may be thus regulated. This is but another way of saying that any zoning regulation is a valid exercise of the police power which is necessary to subserve the ends for which the police power exists, namely, the promotion of the public health, safety, morals and general welfare. It will thus be seen that the police power as evidenced in zoning ordinances has a much wider scope than the mere suppression of the offensive uses of property (*Des Moines* v. *Manhattan Oil Co.*, 184 N. W. 823), and that it acts not only negatively but constructively and affirmatively for the promotion of the public welfare. (*Bacon* v. *Walker,* 204 U. S. 311.)

* * *

"* * * It may be safely said, we think, that it is the consensus of opinion that the regulation of the development of a city, under a comprehensive and carefully considered zoning plan, does tend to promote the general welfare of a community and there is no doubt it seems to us that the adoption and enforcement of such a plan, when fairly conceived, and equably applied, is well within the scope of the police power. The increase of our urban population makes regulation necessary. As the congestion of our cities increases, likewise do the problems of traffic control and police, fire and health protection. Comprehensive and systematic zoning aids in the successful solution of these problems and obviously tends thereby to affirmatively promote the public welfare. Decisions upon the constitutionality of comprehensive zoning are not numerous but the weight of authority upon the subject is, however, strongly in favor of the constitutionality of comprehensive zoning. * * *

"That there are reasonable minds which are of the belief that a regulation creating and establishing strictly residential districts is necessary and proper is evidenced by the passage of such ordinances in such widely varying parts of the Union as Massachusetts, Louisiana, New York, Kansas, Iowa and Wisconsin. In each of these states the problem of the validity of the establishment of a strictly residential district was before the highest court of those respective jurisdictions and in each case such ordinance was held to be within the scope of the police power.

* * *

"In addition to all that has been said in support of the constitutionality of residential zoning as part of a comprehensive plan, we think it may be safely and sensibly said that justification for residential zoning may, in the last analysis, be rested upon the protection of the civic and social values of the American home. The establishment of such districts is for the general welfare because it tends to promote and perpetuate the American home. It is axiomatic that the welfare, and indeed the very existence, of a nation depends upon the character and caliber of its citizenry. The character and quality of manhood and womanhood are in a large measure the result of home environment. The home and its intrinsic influences are the very foundation of good citizenship, and any factor contributing to the establishment of homes and the fostering of home life doubtless tends to the enhancement not only of community life but of the life of the nation as a whole.

"The establishment of single-family residence districts offers inducement not only to the wealthy but to those of moderate means to own their own homes. With ownership comes stability, the welding together of family ties and better attention to the rearing of children. With ownership comes increased interest in the promotion of public agencies, such as church and school, which have for their purpose a desired development of the moral and mental make-up of the citizenry of the country. With ownership of one's home comes recognition of the individual's responsibility for his share in the safeguarding of the welfare of the community and increased pride in personal achievement

which must come from personal participation in projects looking toward community betterment."

In *Pritz* v. *Messer*, 112 O. S. 628, 149 N. E. R. 30, 35, the Supreme Court of Ohio, in the course of its discussion, said:

"Reverting to our original consideration, we have to remind ourselves that the question is not whether the slum will certainly be eliminated by such zoning, but whether such zoning reasonably tends toward the elimination of the slum; not whether congestion of traffic and enhanced public health and improved public morals will certainly result from the enactment of such measures, but whether there is a reasonable connection between such measures and the public health, morals, and safety.

"Upon mature consideration, after two exhaustive hearings given in this case, we can not say that there is no relation between the legislation enacted and the public health, safety, and morals. It is true that the slum roots in causes deeper than the mere kind of building found therein. It is true that non-nuisance businesses might better, so far as the health of their own inhabitants is concerned, be conducted in districts where there are no apartment houses and where there is no business life. It is also true, however, that family life is promoted by the separation of families, and by their residence in districts where the open spaces, the possibility of gardening, and the freedom from the society which presses around one in a partial business and tenement district, make for health through recreation and peace of mind.

"The entrance of business blocks into a residence district tends to 'blight' the district and gradually to invite therein the hazards, both physical and moral, which exist in the sections which combine business with home life.

"We cannot say that there is no reasonable relation between the public morals and an attempt to set off for the people of a great city ample parts of the town in which they can always maintain residence districts,

unblighted by industry and by the old style of tenement. In this particular instance such tracts of this kind have been reserved as will be available for the inhabitants of Cincinnati for a hundred years to come.

"If a law regulating the air space which must be allowed in a tenement house has a reasonable relation to health, we can not say that a measure which will save considerable districts for the city in which the air space is unblocked by massed building construction has no reasonable relation to health. The mere fact that the economic factor looms largest in determining the choice of a residence does not mean that restrictions which give space and air, light, and separation to houses will not eventually shape the kind of building which is done, and benefit the public health. The laws which compelled tenement houses to install plumbing and sanitary conveniences did not do away with poverty, but they did compel builders in future building to conform to certain health standards. We can not assume that similar results will not occur from regulations such as these embodied in this zoning ordinance.

"Furthermore, we can not say that the council did not look forward to a time when by the natural functioning of the law of supply and demand the tide of population would turn in the direction where light, air space, and health can be secured as normal living conditions, and where by these restrictions and by public demand the builders would be compelled to build homes which would make for the maintenance rather than for the deterioration of the American family.

"This problem must be viewed from the standpoint of coming generations. Regarded from the limited outlook of the immediate present, it is easy to claim with some degree of cogency that there is no relation between these measures and the public health, safety, or morals. Taking a long view into the future, however, and looking back into the past, to remind ourselves what detriment the unrestricted congestion in city life, both of traffic and housing, has already done the public welfare, we do see a real relation between the substantial material welfare of the community and this effort of the city to plan its physical life."

A still more recent decision is that rendered in November, 1925 by the Court of Appeals of New York in the case of *Matter of Wulfsohn* v. *Inspector of Buildings of the City of Mt. Vernon*, 241 N. Y. 288, 150 N. E. R. 120. It was concerned with the height, setback and rear yard regulations of an apartment building in a residence A district. The court discussed chiefly the right to exclude apartment houses altogether from single-family districts, deducing from the right of such exclusion the validity of the lesser actual restrictions of the Mt. Vernon ordinance. The opinion, written by Chief Judge Hiscock, and concurred in unanimously by all the members of the court, contains the following passages:

> "In support of such a regulation we think the zoning authorities could assume and the courts below could have found that the orderly and advantageous development of the city of Mount Vernon and the welfare of its citizens would be promoted by fundamental division of the city into districts devoted respectively to business and residential purposes under which its dwellers might establish homes in the latter districts where they would be free from disturbing conditions and risks and deprivation of health conditions such as light and air ordinarily incident to congested business districts; that in the residential districts of Mount Vernon municipal facilities for sewage and water were liable to be overtaxed if the erection of large apartment houses was permitted; that through the construction of apartment houses whereby there would be gathered a large number of people in the space ordinarily occupied by a single family there would result a congestion of population increasing the dangers of traffic, especially to children, and multiplying the chances that through the carelessness of some individual fire and conflagration might be started or disease communicated and epidemics set on their way; that the advantages and value of property devoted to private residences would be impaired. If we are right that such facts could be found or assumed we do not think that a court could say as matter of law that a zoning regulation

excluding large apartment houses could not be justified. There would be no object in creating a residential district unless there were to be secured to those dwelling therein the advantages and that immunity from risks and danger which would ordinarily be considered as the main benefits of such residences.

"Of course, zoning regulations are an exercise of the police power, and as we approach the decision of this question we must realize that the application of the police power has been greatly extended during a comparatively recent period and that while the fundamental rule must be observed that there is some evil existent or reasonably to be apprehended which the police power may be invoked to prevent and that the remedy proposed must be generally adapted to the purpose, the limit upon conditions held to come within this rule has been greatly enlarged. It is not limited to regulations designed to promote public health, public safety or to the suppression of what is offensive, disorderly or unsanitary but extends to so dealing with conditions which exist as to bring out of them the greatest welfare of the people by promoting public convenience or general prosperity. *Bacon* v. *Walker*, 204 U. S. 311, 17-18. Being designed to promote public convenience or general prosperity as well as public health, public morals or public safety the validity of a police regulation must depend upon the circumstances of each case and the character of the regulation for the purpose of determining whether it is arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose. *C. B. & Q. Ry.* v. *Drainage Commrs.*, 200 U. S. 561. The field of regulation constantly widens into new regions. The question (of regulation) in a broad and definite sense is one of degree. Changing economic conditions, temporary or permanent, may make necessary or beneficial the right of public regulation. *People, ex rel. Durham Realty Corp.*, v. *Fetra*, 230 N. Y. 429; aff'd in principle—257 U. S. 665. While the validity of police regulation certainly is not to be rested simply upon popular opinion it has been said that it has been 'put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant

opinion to be greatly and immediately necessary to the public welfare.' *Noble State Bank* v. *Haskell*, 219 U. S. 104.

"Acting in accordance with these general principles courts on the whole have been consistently and sensibly progressive in adjusting the use of land in thickly populated districts to the necessities and conditions created by congested and complex conditions by upholding as a constitutional exercise of the police power zoning ordinances passed under state authority to regulate the use of land in urban districts. What was once a matter of voluntary submissions to restrictive covenants in grants has become a matter of compulsory obedience to ordinances having the force of statutes. It has come about that 40 states have passed laws authorizing zoning ordinances which in one form and another had, in January, 1925, been adopted by 320 municipalities. Commencing, generally speaking, where restrictive covenants commonly stopped with the exclusion from residential districts of factories and business buildings, they have developed until as in the present case they create residential districts in a large sense limited to private dwellings as distinguished from hotels and apartment houses. Thus far these regulations have been sustained as being conducive to public health, safety and morals. With few exceptions courts have not been ready to say that they might be sustained merely because they preserved the aesthetic appearance of a private residential district and prevented its appearance from being blotched by the erection of some incongruous structure whereby the value of all neighboring property was impaired. The Supreme Court of the United States has, however, gone so far as to approve in substance the views of the Massachusetts Supreme Court that aesthetic considerations might be considered as auxiliary of what thus far have been regarded by the courts as more effective and sufficient reasons. *Welch* v. *Swasey*, 193 Mass. 364; *Welch* v. *Swasey*, 214 U. S. 91, 108.

"In attempting to apply all of these principles to the present case we deem it unnecessary to consider the proposition that zoning authorities may establish residential districts. This court has so definitely ap-

proved that proposition that we make take its decision as a starting point in the consideration of the further questions now before us. *Lincoln Trust Co.* v. *Williams Bldg. Corp.*, 229 N. Y. 313.

"Having the power as we thus assume to establish residential districts it seems to us that the zoning authorities of Mount Vernon had the power to make such classification really effective by adopting such regulations as would be conducive to the welfare, health and safety of those desiring to live in such a district and enjoy the benefits thereof as we ordinarily conceive of them. Outside of large cities where more or less congestion is inevitable, we ordinarily think of a residential district as devoted to private homes rather than to commercial buildings. Such was apparently the character of the territory here involved before the zoning regulations were adopted. The primary purpose of such a district is safe, healthful and comfortable family life rather than the development of commercial instincts and the pursuit of pecuniary profits. Such life goes on by night as well as by day. It includes children as well as people of mature judgment and is housed in buildings which are not ordinarily of that character most designed to resist conflagrations and where fire protection is scantier and less effective than it would be elsewhere. *Welch* v. *Swasey*, 214 U. S. 91, 107.

"It seems to us quite in accordance with the decisions and principles to which we have referred that zoning authorities should have the right in a residential district to promote these purposes and to protect the people desiring to enjoy these conditions by excluding big apartment houses like the one proposed by appellant whereby the congestion and dangers of traffic on streets where children might be, and the dangers of disease and fires would be increased, to say nothing of other things such as the destruction of the character of the district as a residential one and the impairment in value of property already devoted to private residences.

* * * * * *

"It is not an effective argument against these ordinances, if otherwise valid, that they limit the use and may depreciate the value of appellant's premises.

That frequently is the effect of police regulation and the general welfare of the public is superior in importance to the pecuniary profits of the individual."

CONCLUSION

According to the principles of constitutional law practice, legislation is presumed to be valid, and he who attacks the validity has the burden of proof. This is also true of municipal legislation in Ohio. But waiving aside this question of who has the burden, we believe that we have demonstrated beyond question, that by virtue of the great weight of authority of judicial decisions in zoning cases, that by virtue of the analogies of other modes of regulating property in the interest of the public health, safety, morals, convenience, order, prosperity and welfare, by virtue of even a casual analysis of the problems which need to be dealt with by legislation to reduce the evil effects of unregulated building development in urban communities in America, by virtue of the opinions of those qualified on the health, safety, convenience and welfare problems of urban communities, by virtue of the recognition by the courts of the relationship of district or zone regulation to the promotion of public health and other benefits within the police power, zoning is constitutional and falls well within the constitutional scope of the powers of Ohio cities and villages.

Respectfully submitted,

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APPENDIX

Zoning and Health

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INTRODUCTION

The word "zoning" is now commonly used to designate the governmental process of dividing municipalities into districts and imposing on private property in such districts, uniform building restrictions relating to height, bulk, and use. The New York Committee which set the pace in this matter was called by the descriptive title, "Committee on Building Districts and Restrictions," but the shorter expression seems to be preferred by the American public, even if the districts established bear little resemblance to mathematical zones.

It was natural and fitting that zoning should begin in New York, N. Y., because this largest of cities was suffering most from congestion, indiscriminate building, and the encroachment of private on public interests. The conditions were prejudiciously affecting the welfare of the community as a whole, working damage to property investments and personal injury to individuals. Zoning came to New York as a necessary act of salvation; but it is a measure the need of which has since become recognized in scores of American cities, witnessed by the two hundred and more zoning ordinances which have been passed during the last ten years. So general has zoning become that one may wonder why it is necessary at this late date to consider the fundamental reasons for it or seek to justify its constitutionality. It is not realized, perhaps, that court decisions resulting from mandamus proceedings and involving the question of constitutionality are relatively few in number and not altogether in agreement. The legal status of zoning can not yet be regarded as fixed, although each year appears to strengthen its standing. It is worth while, therefore, to

consider some of the basic ideas which underlie the restriction of buildings by districts and without which zoning laws would be unsound.

In the typical zoning ordinance, provision is made for several height districts in each of which a limit is placed on the height to which buildings, or parts thereof, may be carried on established street lines, with provision for greater heights for parts of buildings back of certain established planes. From two to five or more height-districts are commonly provided, with uniform regulation for each district, the street width being often used as the basis of the mathematical statement of height permitted. Bulk or area districts are covered by regulations which fix the percentage of the lot which may be occupied and the location and extent of open spaces in front of and around the building. Use districts differ according to the permitted or prohibited use of buildings or land, and are described by the words, "residential," "business," or "industrial." The various districts vary greatly in size and shape, and the three kinds of districts are rarely co-extensive; hence, in any zoned city, there are many combinations. As the movement progresses, there seems to be a tendency to simplify the law by making residence, business, and industrial areas the primary basis of classification, and subdividing each of these on the basis of height and bulk.

It is important that there be uniformity of regulation for each district, for without this the principle of equality before the law would be violated. It is important, also, that the zoning plan be a comprehensive one for the entire city.

Zoning is an essential part of city planning. Generally speaking, about three-fourths of the land area of a city is privately owned and subdivided into blocks and lots; the other fourth, devoted to streets, parks, etc., is owned by the municipality or dedicated to public uses. Again, speaking in generalities, municipal control of the public land is obtained through the governmental power of eminent domain, while municipal control over the use of private property is dependent on the exercise of police power. With rare exceptions, eminent domain has nothing to do with zoning; there is no question of compensation to the owner; no question of the necessity of acquiring private property for public use. The constitutionality of zoning depends on whether the restrictions proposed are justifiable under a

reasonable use of the police power, a common-law principle which, although undefined and undefinable, finds its backing in certain well recognized needs of the community. Used conservatively, the police power has to do only with injury to health, safety, or morals; used more liberally, it covers, in addition, such matters as the public order and convenience and even extends to what are called the amenities of life. With the increasing concentration of people in cities, there is good reason for the widening scope of the police power which has been witnessed during recent years.

Zoning is advantageous to a city in many ways. It tends to stabilize real estate values, to promote orderly building, to enhance beauty, and to develop local self-consciousness and civic responbility on the part of the people. Yet, in the face of these benefits, zoning is likely to be declared by the highest courts to be unconstitutional if it can not be justified under the police power; and although instances may be cited where the police power has been exercised in a constructive manner to promote the general welfare of a community, its preponderant use has been to prevent injury to health, safety, morals, and—the lawyers like to add—"the like." The purpose of this paper is to outline the scientific evidence bearing on the relation of zoning to health.

Health.—At the outset, it is important to grasp the full meaning of the word "health," to realize that it is more than the absence of disease; that it has a positive quality; and that it has to do with the mind as well as the physical body. It is useful to keep in mind the derivation of the word from the Anglo-Saxon "haelth," which implied wholeness. If one were to venture a definition, it might be said that health is "that state or quality of life in which the body is sound, the various organs function naturally and the whole organism responds adequately to its environment."

In a popular sense, public health means the general or collective health of the community. In an administrative or legal sense, it means the health of the community as influenced by factors which affect a considerable number of people in some connected way. The police power is not limited to public health used in this restricted sense, but deals with health. Attention should be called to the fact that the adjective public restricts the word health instead of amplifying it.

Although it is difficult to define normal health, it is recognized that some factors tend to injure it, or lower its state, whereas other factors tend to promote it, or raise its state above the normal. Normal health presupposes a normal environment, the two ideas being complementary and inseparable. It is the purpose of zoning as it is that of sanitation, to secure and maintain an environment in which normal human beings can lead normally healthful lives.

In an address[1] on "Sanitation—Its Relation to Health and Life," before the Sanitary Engineering Division of the Society, the writer has already pointed out that the principal injurious factors to health are infections, poisons, and accidents. The physiological factors, air, food, water, light, temperature and humidity, sleep, exercise, clothing, and shelter, and the sensatory factors, smell, taste, sound, sight, and touch, are either health-promotive or health-injurious, according to their nature. This classification, indefinite though it is, serves to steady one's idea when considering the complicated relations between health and environment.

Quantitatively, health can be measured only imperfectly and in part. Individual health may be expressed in terms of growth, height, weight, and other biometrical units. Community health on its negative side may be measured in terms of death rates and sickness rates, general and specific, for different classes, age groups, and particular diseases. No adequate methods of measuring community health, on its positive side, have yet been developed; perhaps they will come in time.

To a large extent, therefore, the subject under discussion is beyond the range of statistics; and reliance must be placed on accumulated experience and the opinions of competent authorities, rather than on logical scientific demonstration, although, in certain parts of the problem, scientific proof is available.

Indoor and Outdoor Conditions.—The relation between health and indoor life has long been recognized. Laws and ordinances covering the size and ventilation of sleeping rooms, drainage, dark hallways, cellars, windows, refuse disposal, and many other items, are common. Detailed building and plumbing codes, housing laws, tenement house laws and the like are in force in most cities. It is well

[1] *Proceedings*, Am. Soc. C. E., April, 1924, Papers and Discussions, p. 490.

recognized by the courts that insanitary indoor conditions are prejudicial to the health of the people. It is coming to be recognized that, in important ways, indor conditions are dependent on and controlled by outdoor environment. The light that enters a room through a window depends on the light that falls on the outer wall of the building, and this is affected by the position, height, and bulk of neighboring buildings. The quantity of air that enters a building is influenced, sometimes very greatly, by neighboring buildings, and the quality of the air is affected by what is going on in the neighborhood. In fact, nearly all the physiological and sensatory factors related to health may be used to illustrate the close connection between indoors and outdoors.

Placing restrictions on the height and bulk of buildings is virtually public control of the space outside the buildings. It prevents private owners from monopolizing light and air to which all people should have a common right. In some respects, time-honored conceptions in regard to property rights are faulty. It is assumed that lots of land privately owned are bounded by vertical planes which extend upward and downward without limit, unmindful of the fact that, in this latitude at least, the sun's rays fall slantingly on the earth and the winds blow horizontally. Building without limit on one's land, therefore, may interfere with a neighbor's use of his land and the enjoyment of certain bounties of Nature, thereby doing injury to his health and comfort. From this point of view, restriction on height and bulk appears to be justifiable.

Conversely, the indoor use of property may affect outdoor conditions. Buildings of great height and bulk lead to such indoor massings of people that not only are the means of ingress and egress provided with difficulty, but means of conveyance and the streets themselves become so congested that safety, health, and morals are jeopardized. Congestion may extend even to the substructures of the streets—the water mains, sewers, gas pipes, and electric light and telephone wires. Municipal governments, responsible for the streets and their use, can not adequately perform their duties in the face of excessive developments of private property abutting on the streets. The indoor use of property, whether for residential, business, or industrail purposes, controls the character of the vehicular traffic and the character of the pavements required for it; it

affects the cleanliness of the streets, as well as dust, odors, sights, and noises. The abutters and the public have common interests in the streets and public lands, which can be protected only by placing restrictions on the use of private property.

Phases of Life.—One of the primary purposes of zoning is to safeguard the conditions which affect three primary phases of life, namely, work, recreation, and sleep, each of which occupy about one-third of the adult's normal day. Adequate provision for work, sleep, and recreation (using this word in a sense broad enough to include rest and nourishment and not merely as a synonym for pleasure), is essential to health. The necessary conditions are not the same for all three, although for sleep and recreation they are not dissimlar. The keynote of work is efficiency; of sleep, quiet; of recreation, cheerfulness.

In infancy and old age, and with the sick of all ages, the conditions which favor sleep are especially important. During childhood and youth, when bodies are growing and minds are developing, the recreation phase controls. In middle age, the work phase predominates. To a large extent, the three phases of life are controlled by the sun—the day is for work, the night for sleep, and the morning and evening for recreation; but to an increasing extent, life in cities ignores the clock. Factories run continuously, night work is required in many ways, transportation never ceases. Those who work at night must sleep by day. What was once a "time" separation is fast becoming a "place" separation. To obtain normal, healthful conditions in cities, home life must be separated in place from work life, and, in order that permanency be given to this separation, a certain amount of governmental control of private property is essential. This is the basic principle which underlies building restriction by districts.

In making this place separation, it is necessary to take into account various practical considerations. Many people like to live within walking distance of their work, and the daily walk, if not too long, is one of the positive factors of health. Home life requires that the grocer, the butcher, the baker, and other neighborhood conveniences be not too far away. Certain associated businesses gain in efficiency by segregation. Some kinds of manufacturing involve processes which are noisy or which give rise to odors, bearable during work, but offensive from the stand-

point of home life. Cities which have been built under the doctrine of *laissez faire*, can not be rebuilt in a day. These and similar facts have led to the establishment of zones of the most irregular shape, size, and position, zones not always topographically logical, but the best that can be established under the circumstances. The need of zoning is the best argument in favor of city planning and regional planning.

The primary object of zoning, therefore, is (1) to protect the basic phases of life against injury by providing adequate place-separation of residence, business, and industry; and (2) to prevent the private monopoly of natural light and air, necessary to health, by restricting the height and bulk of buildings in ways appropriate to their neighborhood.

With these general principles in mind, various factors involved in the problem, namely, light, air, noise, odors, congestion, and the like, will now be discussed in some detail.

Light.—The rays of the sun bring light and heat to the earth and both are necessary to man's existence. Dr. Haven Emerson, paraphrasing Michelet, has tersely epitomized human experience by saying, "You can not raise babies any more without light and air than you can raise plants." Although admittedly mysterious in its action, sunlight is of positive biological benefit and this is true even of diffused sunlight, or daylight. Its action is both physiological and psychological. It is a natural stimulant to the skin and the nervous system. It aids naturally in providing resistance to the body against diseases like tuberculosis. It has recently been learned that it plays an important part in the cure and prevention of rickets in children. It helps to cure tuberculosis of the bones. It provides illumination, the absence of which hampers activities of mind and body and induces eye-strain with its attendant damages and discomforts. It provides warmth in winter. Although science has not yet fathomed the influence of the sun's rays (and this influence may perhaps include the rays beyond those of the spectrum of light), it is a matter of accumulated experience that sunlit rooms are not only cheerful, but healthful, and that dark rooms are gloomy and unhealthful.

There are likewise many indirect benefits. Sunlight is a powerful disinfectant, rapidly destroying bacteria ex-

posed to it, whether floating in the air or resting on pavements, floors, or walls. Unequal heating of the air induces convection currents and beneficial air movements. Places not exposed to sunlight are more likely than others to contain stagnant air. Air movements have an important influence in regulating the temperature of the body. Stagnant air around the body tends to increase in humidity, thereby making a person feel warmer in summer because of lessened evaporation and cooler in winter because of greater conduction of heat by the moist air.

Sunlight tends to reduce the relative humidity of the air by increasing its temperature and its ability to hold water vapor. By removing moisture from dust particles in the air, it tends to lessen fogs. It tends to dry pools of water which otherwise might become breeding spots for mosquitoes.

Sunlight markedly influences vegetation. Trees, shrubs, and grass are natural automatic regulators of heat conditions. During the summer, trees produce desirable shade, yet, in winter, they do not obstruct the sunlight. In this respect, the shade of trees differs from the shade of buildings. Vegetation also provides a natural chemical balance. Human beings, as well as all animals, inhale oxygen and exhale carbonic acid; whereas plants in sunlight take in carbonic acid and give out oxygen. Vegetation can not thrive without sunlight and water. It is a matter of history that the increasing height of buildings and the increasing extent of impermeable area, due to buildings and pavements, drives out trees, shrubs and grass. The effect of vegetation is local. Trees and grass concentrated in parks can not take the place of vegetation on streets and individual house lots.

Daylight, which means indirect lighting from the sun, by reflection from the sky, the clouds, and various surfaces, does all these things, but to a less degree than direct sunlight. Sunlight may even be too great, as every one knows, especially during the summer and in the tropics. Daylight has an important economic value. It is not only beneficial physiologically and psychologically, but increases the productiveness of labor and reduces the necessity of artificial illumination. Artificial illumination involves expense and must be arranged with great care in order to be effective and not cause injury to the eyesight. Lighting with oil or gas tends to vitiate the air by increasing the carbonic

acid and moisture, and even by increasing the poisonous carbonic oxide.

Artificial lighting also increases fire risks. Lack of proper exterior lighting increases the window space required and this, in turn, increases the heat loss in buildings in winter.

There are abundant reasons, therefore, for stating that adequate provision for allowing daylight to enter an inhabited building is essential to human growth, health, vitality, and comfort. Whoever, by building overmuch on his own land, prevents his neighbor from receiving a reasonable amount of light on his land is doing him an injury that properly comes within the scope of the police power.

Much can be done to make the best use of sunlight by the orientation of buildings and streets. Buildings facing the cardinal points are not as well lighted throughout the year as those facing the quarter-points. Our western townships with their north, south, east, and west boundaries have tended to grow up into cities having streets in these directions. Many trivial matters often control street orientation, whereas the element of sunlight receives scant attention. The matter does not become one of real importance until high buildings are constructed, and, by that time, street lines have become fixed. Contact with civil engineering students in recent years has convinced the writer that astronomy receives too little attention in the schools. Few students, on graduation, are able to trace the sun's path in the heavens at different seasons or to draw the shadow of an isolated house, not to mention the shadows of high buildings on each other, when located on a street of given latitude, width, and direction.

Air.—The necessity of pure air need not be argued. It is a fundamental principle registered by human experience. Modern studies of ventilation emphasize the physical properties of the air—temperature, humidity, and movement—and their physiological importance. These heat relations are closely linked with the problem of sunlight, already considered.

Nothing in recent experimentation, however, controverts the need of cleanliness of the air we breathe. Dust in the air tends to irritate and clog the breathing apparatus. If the dust particles are sharp, as in the case of silica, they wound the delicate membranes so that bacterial infection is likely to follow. Statistics of tuberculosis among stone-

cutters show that this disease is prevalent in direct proportion to the percentage of silica in the stone dust. Dust may injure the eyes and clog the pores of the skin. Its damage is economic as well as physiological. The extent to which disease germs are transmitted from person to person through the air is not well known. Ordinarily, spray from the mouth or nose does not carry more than a few feet, and accompanying bacteria capable of detection by present methods do not live long in the air because of the destructive effect of drying and sunlight. The behavior of the filterable viruses in air and the longevity of the spores of bacteria, moulds, and fungi, however, are only imperfectly understood. Irritating fumes from chemical processes may be not only offensive to the senses, but also cause physiological injury. Any air which by reason of dust or bacteria, irritating fumes, or offensive odors, tends instinctively to induce shallow breathing, must be regarded as injurious to health. Just as pure air tends to promote health by naturally inducing deep breathing and stimulating the bodily functions, so exposure to vitiated air tends to break down the individual's power to resist disease, especially respiratory affections, such as colds, pneumonia, and tuberculosis. Here, the element of time is important. A fleeting bad odor may be offensive, but do little or no injury, whereas some odors, long continued, may be injurious. On the other hand, there are odors to which people become accustomed and which do no damage. Individual susceptibility plays an important part in the phenomenon of odor. The extent to which foul air affects breathing during sleep appears to be not well known from experimental studies, but judging from experience, its influence is quite as important as during waking hours.

The air which enters a building, both in quality and quantity, is influenced by the neighboring buildings and by the streets. Intakes of ventilation systems are more often located with reference to indoor distribution than to exterior conditions which affect the quality of the entering air.

Many studies have been made of the number of dust particles and bacteria in city air, both in the United States and abroad. The absolute figures need not be considered, because their order of magnitude varies according to the methods used and the sizes of the dust particles included in the counts. Relatively, the tests agree in showing that

dust in the air is greatest near the street and decreases logarithmically upward; that macadamized streets and much traveled granite pavements produce more dust than streets sheet-paved; that dust is closely associated with the cleanliness of the streets and methods of cleaning; that automobile traffic produces less dust than horse traffic, but distributes it to a greater extent; that street cars raise dust one or more stories higher than horse traffic; that less dust is found over grass land than pavements; that less dust is found in residential districts than in business or industrial districts, etc.

Smoke is another important source of dust. The use of oil-burners in place of coal-burners is changing this problem. The Mexican oils are higher in sulphur than American oils, and their use increases the sulphurous fumes in the air to a measureable extent.

Where high buildings exist, the ventilation of streets is coming to be an important problem. If buildings are high relative to the street width, there is likely to be a stagnation of air over the pavement and a concentration of dust, bacteria, foul odors, and automobile smoke, injurious to the health of persons using the streets.

The density of automobile traffic in cities is already so great that traffic officers are sometimes overcome by the poisonous fumes of carbonic oxide, and pedestrians are greatly inconvenienced by the smoke. In business districts, where heavy trucks are used and traffic is heavy, these conditions are especially bad, and are at their worst when associated with high buildings with flat roofs and overhanging cornices. If the streets have a marked grade, there is a tendency for gravity currents to produce partial ventilation with dilution of the bad air; but when they are level, gentle winds do not suffice to effect the necessary ventilation of deep, cavernous streets. Strong winds, on the other hand, produce excessive currents through cavernous streets, that are very objectionable in winter.

In the interest of air purity, therefore, zoning is justified. Residential districts, where people sleep and recreate and where children grow up, need protection against the atmospheric dirt of the business and industrial districts.

Noise.—Susceptibility to noise in general and to particular noises varies greatly among individuals. It is a difficult question to discuss. It is well-known that noises hinder sleep. Physicians say that certain persons, especially those

suffering from nervous diseases, are seriously injured by noise and vibration. Every one knows that in many ways noises interfere with the comfort and tranquility of life. Quiet is especially important at night, in residential districts, and near hospitals and schools.

Noises are greatly increased by the reflection of sound waves from the hard surfaces of pavements and building walls. Limitation of the height of buildings is, therefore, a means of noise reduction. Vegetation, on the other hand, tends to dampen sound waves—another reason for providing conditions favorable for trees and grass in residential districts.

Many kinds of noises are preventable, but others appear to be inseparable from traffic, business, and manufacturing processes. In these cases, segregation appears to be the best solution.

Congestion.—Congestion, or crowding, needs to be viewed from at least three angles as far as health is concerned, that is, room crowding, land crowding, and personal contact.

Room crowding is commonly expressed as a ratio of the number of square feet of floor area, or number of cubic feet of room volume, per person. Minimum limits are sometimes placed on one or both of these ratios for sleeping rooms, barracks, schools, factories, etc., based on the hygienic need for light, air, and ventilation—matters which have already been considered.

Land crowding, expressed as so many persons per acre, introduces two aditional elements, the number of stories and the area of the building with reference to the size of the lot and the street width. One of the most important reasons for restricting the height and bulk of buildings by districts is to prevent overcrowding of corridors, elevators, streets, and sidewalks. These have to do more with questions of safety and accident than with normal health, questions not considered in this paper.

The third phase of congestion bears directly on the spread of disease. When people are brought into such close contact that opportunity exists for breaths to intermingle, as in crowded elevators and cars, or for the nasal spray of one person to pollute the air breathed by another, there is serious danger that disease germs may spread and that colds and respiratory diseases may become epidemic. It may be true, as medical bacteriologists claim, that crowd

exposure tends to build up an acquired immunity against certain diseases so that to some extent Nature protects itself, but the fact remains that, on the whole, crowding speeds up and increases the transmission of disease. It is a menace to health, morals, and safety.

No one has yet established a logical basis of street capacity, either for pedestrians or vehicular traffic, or the relation which an adequate street capacity should bear to the size of abutting buildings. Most streets in American cities were laid out to accommodate slow-moving traffic and buildings of two, four, or six stories, or thereabouts. Increase in building height has led to serious street congestion in many places. Fragmentary data exist as to the number of square feet per person in buildings used for different purposes, the permissible capacity of elevators, the space occupied by moving pedestrians under different conditions, and the street space monopolized by vehicles of different character moving at different speeds. These data should be assembled and studied with a view to establishing, if possible, some reasonable relation between building size and street area. The writer's unsatisfactory attempt to do this (too meager to warrant publication), has convinced him that the fundamental data need first consideration.

Psychological.—Health is mental as well as physical. Mental health is intangible, but none the less real. Sunlight is beneficial largely because it is cheerful. Trees and grass and flowers are healthful for the same reason. The beauty of form, color, light, and shade conduce to mental health. Eyes are rested by a change of focus and ears by a change of sound. Monotony causes mental fatigue, and carried to the yielding point, may cause insanity. Children, especially, need opportunities for proper development and adjustment of the senses, but all workers like to get away from their work at night. A most important benefit of zoning is to provide opportunities for the changes necessary to normal mental health.

Community Health.—It is easy to object to particular applications of the zoning principle. Building restrictions of necessity must be arbitrary. Boundaries of districts must be actual lines, and in establishing lines where conditions grade almost insensibly one into another, it is difficult to avoid individual injustices. It is ofen difficult to show that zoning prevents injury to the health of certain

particular individuals. There are various matters for adjustment and administration which should be provided for, as well as may be, in zoning laws. Although zoning as a principle has abundant justification under the police power, it must not be forgotten that since Magna Charta, the individual has had protection against undue restrictions of government in what is known as "due process of law."

The relation between zoning and health is a mass relation. It is the health of the community, the collective health of many people, that is at stake. Families rightly separate working quarters from sleeping quarters; cooking and eating and sleeping in the same room is regarded as insanitary. Tenement-house laws, factory regulations, building codes, and the like, safeguard the internal uses of the buildings. The zoning law does for a city what some of these laws do for the factories, schoolhouses, and dwellings.

When cities grow without plan, their constituent districts tend to change in character. Single houses give way to apartment houses; residential districts are insidiously invaded by business and manufacturing; and old buildings are converted to uses for which they were not intended and for which they are ill adapted. Converted houses are notoriously likely to be insanitary and unhealthful. In a growing city, there is a natural tendency toward concentration for economic reasons. A person who erects an apartment house in a region where only single dwellings exist, is capitalizing for his own pocketbook, light, air, and the other residential benefits at the expense of his neighbors. A single-house region once infected with an apartment house tends to accumulate other apartments, and the neighborhood tends to change from a stable, house-owning population to a shifting, renting class, a class lacking in neighborliness and civic pride and leading an impoverished family life. Thanks to sanitation and other modern improvements, apartment-house life has been made healthful for adult existence, but the compressed and repressed life of a modern city apartment is not conducive to growth or to a life that is full and rich. Segregation of apartment houses is justified as a measure for protecting community health.

Gradually it is dawning on men's minds that cities which grow to great size do so at the expense of the health and comfort of their own citizens; that rapid growth which outruns municipal ability to make or remake necessary thor-

oughfares and provide needed public utilities, leads to ugly confusion, whereas a slower, well-ordered growth is more likely to lead to civic beauty and a better civilization. The United States is entering on a period of lower population increase. As pride in growth and quantity production lessens, as it must, the elements of stability and self-control and beauty need to be strengthened.

Zoning should be regarded as a sort of collective self-control, a means by which a city controls its own life and growth for the best good of all its citizens. It is an act of police power fully justified in the interest of morals, safety, and health.

Statement by Dr. William H. Peters, Health Commissioner of Cincinnati, to City Council of Cincinnati.[1]

January 11, 1924.

The manifold advantages of a well zoned city from a health point of view are attracting the attention of sanitarians all over the country today.

Much of the zoning ordinance which we are considering in Cincinnati is based upon a desire to secure for the public conditions which make for better health, comfort and safety.

The zoning ordinance is not a cure for present ills, but it does safeguard the future against a repetition all over the city, of evils which now prevail in certain sections.

Bad housing in Cincinnati is one of the factors conspiring to keep up the army of susceptibles to tuberculosis at full strength. Our records show and it is generally accepted that overcrowding in dark, poorly ventilated rooms are predisposing causes of this disease. It is proved that sunlight in the living room materially aids in providing resistance against disease like tuberculosis. Nothing at the present time will prevent the development of new slums and tenements in areas not infected. With our high tuberculosis death rate we can not ignore the provisions of the zoning ordinance which will tend to minimize the prevalence of the "white plague" in Cincinnati. No sanitary problem is solved by caring for its victims. It is solved by eliminating the conditions creating the problem. We can labor from

[1] This and other statements contained in this Appendix as made to City Council of Cincinnati were filed with that body while the zoning ordinance of that city was pending.

now until the millennium comes to better housing conditions, but not until we have a zoning ordinance which will prevent the conditions which we are trying to overcome, can we look for any great improvement.

Fresh air and sunshine are admitted to be fundamental in health regulation. Sunlight destroys disease breeding bacteria; ordinary artificial light does not. Dark rooms and artificial light make for eye strain, and lower resistance. People who are able to live and work in well lighted apartments, workshops and offices have a physical resistance which is superior to that of people who live and work in dark rooms. Equally injurious is the lack of adequate ventilation. Were it not for the continual disinfection of the earth's surface by sunlight, the morbidity of infectious diseases would undoubtedly be greater. It is with these thoughts in mind that the zoning commission would limit the height of office buildings, factories, stores and dwellings, and likewise provide open spaces about new buildings.

While clearly essential, we can not get away from the fact that slaughter houses, fertilizer plants, and other odorous and noisome trades, do produce nuisances which lower resistance and undermine health. The complaints which filter through our office force the conclusion. The classification of industrial establishments in districts apart from residence sections gives us the relief desired.

Communicable diseases, particularly the upper respiratory diseases such as common colds, influenza and pneumonia, are acquired as the result of contact within the zone of droplet infection. The same applies to measles, scarlet fever and diphtheria. That congestion and overcrowding favor the transmission of these diseases is perfectly obvious. The restrictions of the zoning ordinance relieve congestion and crowding of public conveyances, and if the plans mature, we shall find many localities in such relation to residence neighborhoods that the employees may in many instances live within walking distance from their work. The zoning ordinance also lessens crowding by placing a limitation on the number of families per acre.

And finally zoning encourages home building by the man of average means in suitable locations where the owner and his family can enjoy the sun sweet air, a little bit of lawn and flowers without any fear of encroachments which may menace his health and comfort or interfere with

the peaceful enjoyment of his possessions. Children who are brought up in single or two-family houses where there is plenty of open space about are more likely to be healthy than those who are brought up in apartment or tenement houses. And in this respect we believe that the zoning ordinance enters the health quotient of Cincinnati.

Statement by Dr. David I. Wolfstein to City Council of Cincinnati

RELATION OF UNREGULATED CITY GROWTH TO NERVOUS DISORDERS

January 24, 1924.

It is an unquestioned fact that we find more "nervousness" in the cities than exists elsewhere.

It is also a fact that there are factors present in our modern cities which are conducive to this increase in nervousness.

These factors are *excessive noise*, continuous and uncontrolled; over-crowded and congested streets; an abnormal hustle and hurry; smoke-laden atmosphere; dust and dirt.

Except in the very largest cities of say, fifty years ago, the contrast between urban and country life was not extreme, but this contrast has today reached the point where city life has become not only very unpleasant, but has imposed a terrific strain upon the nervous system—a strain which the land-dweller escapes.

The advent of the skyscraper has deprived us of sunshine and made canyons of our main arteries of travel, and has tended to bring about a tremendous herding of people and traffic congestion. Elevators shoot us with incredible swiftness to dizzy heights above and drop us just as precipitously to the ground.

Another element has been added by the automobile. It is quite evident that this introduced new problems of complexity into our modern life which call for solution. I need not emphasize the attendant noises; they are too well known; nor do more than mention these two modern inventions; the skyscraper and the automobile, are fast making city life intolerable, dangerous and most unwholesome.

Another factor unknown to former periods is the large factory in close contiguity to residential or crowded business areas, to which must be added such new industries as

garages with their noises, bustle and fumes. Of economic disturbances and inequalities I am not speaking; it is only from the standpoint of health and particularly of "nervousness" that I desire to write these few remarks.

To return to the "simple life" of our fathers is, of course, neither possible nor desirable; we are deriving many advantages from our improvements; we must, however, recognize the attendant disadvantages and attempt to find remedy for them.

The main cause in the production of nervous disorders lies, I am sure, in what we may term an increased state of "tension" in the nervous system. It may well be said that the increase in the number and intensity of stimuli which the nervous apparatus of the modern city dweller must take in day and night has given rise to a state of immediate awareness and alertness; of super-active attention which can only act to constantly maintain and increase this "state of tension." All students of the subject agree that "nervousness" is on the increase and that this increase is only attributable to the "faster pace" and "over-stimulation" of our present-day life.

The city dweller has developed, under the stress of necessity, really a "sixth sense;" the sense of greater awareness; alertness. We can see this even in our children. Although we have provided playgrounds as safety zones, many must still use our streets for their play. Watch them at play; you will see this sixth sense constantly operating to insure freedom from peril. The adult as well, treading his path through crowded thoroughfares, dodging the unending stream of autos and other fast moving vehicles, keeping his "eyes peeled" acts more like a frightened animal than a calm and assured human being. His sense of "alertness" keeps him in a constant state of tension which is surely conducive to the production of nervous disorders.

It is a matter of daily experience that one is obliged to recommend, even to those who can not well afford it, "getting out into the suburbs," in the hope that here they may lead decent, quiet and wholesome lives; in other words, to imitate the procedure of the better situated who have long since resorted to this mode of escape from the terrors of the maelstrom of city life. Unfortunately, even there, there is no assured certainty, for the planlessness and recklessness of over-rapid, under-regulated development has not spared even the outlying districts. These suffer, though

in somewhat less degree, from the same ugly and distressing factors which has turned our modern communities into veritable breeding places for "nervousness," not to speak of many other debilitating conditions to which earlier generations were not subjected.

There is, therefore, before us a very pressing problem: How shall we hope to maintain our nervous system unimpaired despite the fact that we must continue to live the urban lives which we are practically forced to live? The answer is: to remedy, as far as possible, conditions which have resulted from the planless, unthinking, haphazard growth of our cities; to prevent further undemocratic infringement of the rights of others which grew out of the absence of lawful and scientific restraint; and to make studied provision for proper control of factors which modern invention is continually imposing as further burdens to city life.

Our representatives must study and face this problem; if not, living in any modern community will become not only intolerable, but will certainly accentuate the "nervous instability" which is fast putting the stamp of "unfitness" upon this age and generation.

Strength and stability are not the products of noise, hustle and bustle and filth. These qualities, which stand for the "strong mind in the strong body," develop best where there is quiet and sanity of life.

Speaking from the standpoint of a neurologist who so frequently sees the ill-effects to which allusion has been made, the Zoning and Districting Plan meets with my full approval. It will undo in part the evil already done and prevent a far greater degree of evil which adherence to our present foolish, selfish and unscientific system encourages and fosters. Only one word more: Why is it that the element of Beauty as an unquestioned factor of value for health and sanity has received such scant recognition in our American democracy? In the oldest democracies—Greece—this was almost the essential factor. It is fully recognized in a modern democracy—Switzerland; only here in America, there appears to have existed the idea that Beauty, Form, Design, and Aestheticism in general are luxuries; something for the rich; not for the poor. The reverse is true; a well-planned city which has due regard for property rights; for parks and breathing spaces; for art and architecture and music and play, affords to the so-called "common people" the surest safeguard against the incidence of ill health and discontent; conditions which the better situated have always recognized and endeavored to secure.

Report to City Council of Cincinnati of the Committee on Public Health and Social Service of the Cincinnati Academy of Medicine

This committee, in its consideration of the Zoning Ordinance, limits its opinion to the effects of zoning on the health of the people of this community.

This committee holds itself as incompetent to pass upon the merits of divers technical problems involved, such as heights of buildings in relation to thoroughfare width, exact boundaries of zones, etc.

The committee records its definite advocacy of a zoning system for Cincinnati, and subject to such modification as may appear practical and helpful after public hearings, urges early and favorable action on this proposed ordinance by Council.

To the minds of physicians and other persons engaged in health conservation, the conditions attending urban conduct of business, transportation, amusement, housing, etc., afford widespread health hazards that may be mitigated by a proper system of city zoning. In support of this contention, this committee submits certain data based, in part upon the experience and opinion of the committee's personnel, and in part drawn from published reports of other investigators in this field.

Congestion as a Factor in Community Health

This committee advocates the adoption of the zoning system for Cincinnati, because any proper zoning system will include provisions to avoid overcrowding of people. More and more medical experience is leading to the belief that human beings themselves are the chief sources and the disseminators of human diseases, particularly respiratory diseases, such as influenza, pneumonia, bronchitis, common colds, measles, scarlet fever, etc. Not only are the particular germs responsible for these diseases, so distributed, but physical conditions surrounding overcrowding become such as to favor widespread occurrence of these

diseases. From the hospital experience of physicians, it is accepted as a well established principle, that too few cubic feet of space per patient may lead to a variety of disease complications rarely encountered where the cubic foot allowance is adequate. In Cincinnati the congestion on street cars, in elevators, in certain types of stores, in certain types of restaurants, is to be regarded as a prime factor in disease dissemination.

These unfavorable effects of human congestion are not limited to business sections as contemplated above, but are encountered in the living quarters of unplanned cities. This committee accepts adequate housing as the very foundation of human progress. One of the ills of improper housing is the overcrowding always found. Sane, constructive plans, providing for the avoidance of congestion in our business districts and in living districts will go far in the betterment of Cincinnati's public health.

Sunlight and Health

Nature has provided effective means for the continual disinfection of the earth's surface. Sunlight has associated with it certain chemical rays capable of quick killing off those agents responsible for many diseases. Were it not for this continuous disinfecting action of the ultra violet rays, in the sunlight, we might expect an almost uncontrollable growth of bacteria molds, accompanied by unbearable stenches and other offensive results. This helpful action of sunlight is directly efficacious in ridding man of some of his diseases and in preventing the inception of an even larger number. Rickets, a disease common to children, is both prevented and cured by sunlight, providing feeding conditions are anywhere near adequate. Sunlight is probably the greatest single factor in the control of tuberculosis.

Modern urban life, particularly in the unplanned city, tends to the elimination of a proper supply of sunlight, so necessary in the conservation of the health of our people. Tall buildings, inadequate spacing, rooms without proper outside exposures, are all detrimental in this respect. This committee, strong in its advocacy of the beneficial effects of the sunlight, accepts zoning as calculated to protect the people against an unwarranted blocking off of sunlight.

Zoning and Tuberculosis

For many years Cincinnati was regarded as near the top on the list of tuberculosis occurrence and tuberculosis deaths. Only those cities, regarded as sanitaria cities for tuberculosis treatment or residents, had records worse than Cincinnati. At the present time, we are advised by the Health Commissioner, Cincinnati stands fifth, of the large American cities, in tuberculosis occurrence.

The very conditions responsible for a high tuberculosis rate are those conditions that would be prevented by zoning. Tuberculosis is a disease that may be expected to rise under conditions of poor housing, overcrowding, elimination of sunlight, and bad air conditions. The rate of tuberculosis occurrence may fairly well be predicted by examining, not the person, but the conditions under which they live and work. Among office workers, employed in tall or relatively tall buildings, disease rates are higher than obtain among the general population of corresponding ages.

Failure to control here in Cincinnati, during past years, tuberculosis producing conditions, has paved the way for economic losses to the entire city. It has become necessary to maintain expensive hospitals for the care of such efflicted individuals. Even though conditions are clearly ameliorated, tribute must be paid for at least the period of one additional generation for tuberculosis already in progress among our people.

Automobile Traffic and Zoning

Uncontrolled crowding of our business population into small areas of the city will inevitably lead to a near saturation of street space with motor vehicles. The exhausts from such engines, when moving at a fair rate of speed, contain approximately 6 per cent. of carbon monoxide gas. Such exhausts when engines are idling, under conditions of car stoppage, at street intersections, contain carbon monoxide gas in proportions as high as 15 per cent. Inasmuch as a large portion of the air of a tall building enters at low levels, there is every reason to believe that these gases may be distributed to a larger portion of persons in these buildings. This gas, even in low concentration, is definitely harmful, particularly if exposure continues over a considerable period of time. This is a new health hazard and is largely limited to a highly congested urban

life. It may readily be controlled by the avoidance of automobile congestion to that point that the carbon monoxide concentration is below harmful percentages. The same hazard obtains in less congested districts where gasoline motors are repaired and tested in large numbers, in garages and on streets. The residences above and adjacent to garages are probably frequently exposed to this hazard. It is the belief of this committee that proper zoning may obviate this hazard.

Noises, Vibration, Monotony—Common to Urban Life—in Relation to Health

The strain to which the human machine is daily subjected, under conditions of modern living and working, is said to be easily eight times as great as was true 30 or 40 years ago. While no such precise figure is accepted by this committee, it is a plausible belief that the wear and tear on the various systems of our bodies under conditions of modern urban life are conducive to the development of a great variety of neuroses, fatigue conditions, strains, particularly on eyes and ears, that in the aggregate can not fail to become liabilities in the health audit of our people. Noises lasting well into the night, intense lighting, odors from industrial processes, provide undue strain on human beings. Large numbers of persons are engaged in night occupations, necessitating daytime sleeping. It is highly desirable that certain portions of our cities be set apart wherein these strains of modern life may be relatively eliminated.

Air Conditioning and Public Health

From the fact that air is so abundant and obtained so freely it would appear that little opportunity exists for any argument for air conservation in community life. To the contrary, man-made conditions so affect the air we breathe, that it may become of tremendous importance in our lives. Although modern sanitation attaches no great significance to the percentage of carbon dioxide in the air as a health factor, and has proven that there are few grounds for a belief in specific poisons in exhaled air, such sanitary work has established more firmly than ever that frequent changes of air, proper air temperature, air motion, air free from harmful dusts are essential in the maintenance of health.

The relative humidity of air frequently encountered during winter months in many places of business and home

approaches the aridity of desert countries. Such air inevitably leads to the drying out of our mucous membranes and paves the way for divers infections.

Crowded places of amusement, street cars, elevators, school rooms, favor the vitiation of air. Heat strokes (not sun strokes) occur within buildings as a result of improper air conditions. Even in streets, particularly in neighborhoods of tall buildings, normal air currents are so affected as to bring about problems in health among exposed persons in these buildings. All such problems must be linked up with types of buildings, crowding together of buildings, heating methods necessary for certain types of buildings, congestion within buildings.

This committee maintains that these mentioned and other similar problems are amenable to practical solution and control and when controlled will yield results economically and humanely sound. In the belief that Cincinnati in future generations will be confronted with a much larger number of citizens, this commitee urges that at this time such city plans, including zoning, be instituted in order that, so far as possible, the health and other interests of these future citizens may be conserved.

Report to City Council of Cincinnati of the Public Health Federation of Cincinnati

One-third of Cincinnati's population lives in one-nineteenth of the city's area. Thirty thousand of our families live in 6,587 tenement houses— a greater percentage of tenement dwellers than in any other city of our size.

Many of our tenements have dark rooms, dark halls, inadequate open spaces, small yards, little play space for children. Practically none promote health, comfort and good standards of citizenship.

So far as existing tenement conditions are concerned, the situation is practically hopeless. Nothing that we can do will make them desirable homes. Our opportunity lies in the future.

The Public Health Federation strongly urges the enactment of a zoning ordinance for Cincinnati because it is the only method we know of that will absolutely prevent in the future the development of a slum congestion, and that will guarantee for all homes hereafter erected at least a minimum of light, ventilation and play space.

Cincinnati has an abnormally high death rate from tuberculosis. An exhaustive study of tuberculosis made here in 1916 by the U. S. Public Health Service showed that "the distribution of tuberculosis bears a direct relation to that of tenements, being twice as great among tenement dwellers as among these living in separate houses." (U. S. P. H. Bulletin No. 73.)

"Tuberculosis propagated by bad air, foul air and lack of sunlight, causes annually a loss of 200,000 citizens to the United States. This disease could be largely prevented if we lived and worked in pure air, in air relatively free from mineral and vegetable dust, and, last but not least, if we were to construct the buildings in which we live and labor to allow sunlight to enter more freely." (Statement made by Dr. S. Adolphus Knopf, Professor of Medicine, Post-Graduate Hospital, New York City. Report of New York Commission on Building Districts, 1916, page 142.)

"Sunlight in living and sleeping rooms materially aids in providing resistance against disease. The sun has a destructive effect upon disease breeding bacteria. Direct daylight has a powerful influence in destroying pathagenic bacteria. People living in well lighted apartments have a physical resistance superior to that of people who live in dark rooms. That has been proved under controlled experimental conditions in laboratory tests and is a matter of common observation among human beings."

"The portions of a city which have the small family house development show a lower death rate than prevails elsewhere in the city under equal economic conditions. Children brought up in single or two-family houses where there is plenty of land about, are more likely to be healthy than those brought up in an apartment or a tenement house."

(Statement by Dr. Haven Emerson, former Health Commissioner of New York City, one of the leading public health authorities in the United States—Reports of New York Commission on Building Districts and Restrictions, page 105-09.)

In the English garden villages where there is a limitation on the number of families to the acre and where all families live in single family homes with adequate open spaces, the death rate in 1912 varied from 4 to 6 per 1,000. In the cities of England the death rate ranged from 10 to 18 per 1,000.

Direct sunlight is now being used to cure one of the most difficult diseases that medicine has had to combat, namely, tuberculosis of the bone and the joints. Hospitals have been developed in Europe and in several places in the United States devoted entirely to heliotherapy, or sun treatment for these forms of tuberculosis. Authorities of our own Medical College are now working on plans for the more extensive use of sun treatment at the General Hospital.

Sunlight has a recognized place in the cure as well as in the prevention of rickets in children. If sunlight has such remarkable curative powers with serious diseases such as these, its vital importance in keeping people well requires no proof.

Greater congestion in the suburbs of Cincinnati is possible under our present laws than any that exists in our overcrowded basin districts. Any one may build here today the same type of tenement houses that have produced the abominable congestion that exists in New York City. There block after block is being built up with huge tenement barracks, housing as many as 1,600 people to the acre. Such congestion can be duplicated in any suburb in Cincinnati.

Sickness, delinquency, crime, dependency, bad citizenship are all fostered by crowding people together in unsanitary and unwholesome houses.

1. Zoning will do more to make the future Cincinnati a city of healthful homes than any other measure proposed for many years.
2. Zoning will prevent future congestion by limiting the number of families to the acre.
3. It will guarantee a minimum of sunlight and ventilation for all houses and places of work.
4. It will encourage the one and two-family home.
5. It will prevent the city from being over-developed with huge flat buildings such as are now blighting many of the large cities in this country.

Only second in importance to the effect of zoning on the homes in Cincinnati will be its effect on the places in which people work.

Zoning requires at least a minimum of light and ventilation for factories and for office buildings. Our working population should be protected from having to work in

dark, ill ventilated factories and offices. Statistics show that in New York the garment workers who work in congested buildings are afflicted more with tuberculosis than any other class of workers. Modern plants constructed by progressive manufacturers show that they recognize the direct relation of light and ventilation to the health and efficiency of employees.

The Zoning Ordinance proposes to limit the height of office buildings in the congested business district of Cincinnati.

Today, twenty-four American cities have limitations on the height of buildings, including practically all the larger cities: New York, Chicago, St. Louis, Boston, Baltimore, Cleveland, Buffalo, Indianapolis, Los Angeles, Milwaukee, New Orleans, Providence, Salt Lake City, Seattle, Minneapolis.

Two exhaustive studies as to the necessity for limiting the height of buildings have been published—one in New York City in 1913, and the other in Chicago in 1923. Both investigations resulted in recommendations that the height of buildings be limited in the interest of public health, public welfare and public safety.

The Chicago report made by the Real Estate Board recommends that the height of buildings should bear some relation to the width of the street. "If consideration of public welfare was the only thing to consider, it would demand the reduction in the height of buildings far below the recommended limitation." "No injustice is done to property owners from the economic point of view," says the Chicago report, because "the net revenue obtained from a building twenty stories high over a building fifteen stories high is less than one-fourth of 1 per cent. and above a twenty-story building there is a diminution on the return on the investment." In the entire business district of Chicago there are only forty buildings over seventeen stories in height.

Unreasonably high buildings cut off the light and ventilation from each other. The lower offices get practically no direct sunlight and a minimum of daylight, so that most of the office workers in the lower stories are compelled to work by artificial light. The higher the buildings are on a given street the less the sunlight received in the lower stories of these buildings. In a street built up uniformly with buildings two and one-half times the width of the

street a study made in Newark, New Jersey, showed that in mid-winter the ground floors receive absolutely no sunlight.

More than 85 per cent. of the office workers in the congested business district of New York have to work by artificial light. A study of the health of these workers made by the New York Health Department in 1916 showed more illness and a larger number of cases of tuberculosis than for the city as a whole.

What the height limitation on buildings in the downtown business district of Cincinnati should be is debatable. But that there should be some reasonable limitation in the interest of public health, public safety and public convenience is, we believe, beyond dispute.

To permit buildings of an unlimited height means constantly increasing street congestion, added difficulties in fire fighting, more baffling traffic problems, increase in street accidents, great danger to life in case of panic in high buildings. We believe that all these considerations indicate the lack of wisdom in waiting to act until the high building problem has become in Cincinnati the grave menace it is in many other large cities.

Protecting Residence Districts

Zoning further promotes the health and welfare of our citizens by protecting residence districts from being invaded and injured by objectionable businesses and industries.

Men and women are better able to withstand the strain of present-day life when they may enjoy rest and quiet in their home life. Anything that interferes with this is detrimental to health.

Business and industry inevitably disturb residence districts by producing noise, smoke, dust, odors, vibrations, increased traffic, incident to practically every business or industrial establishment.

Approximately one-fifth of the total population of a large city consists of children under five years of age. The necessity of preserving the quiet of residence districts so that these children can obtain a reasonable amount of sleep during the day time is of the greatest importance, as it is also to night workers.

Dust, smoke, noise, odors, do not directly cause disease, but they do have the effect of decreasing the vitality and breaking down physical resistance. Health is not merely the absence of disease. Health is something positive, it involves physical resistance and vitality, it is mental as well as physical.

From a Report on Zoning in the City of Chicago (Reprint Series No. 25, 1923), John Dill Robertson, M.D., Commissioner of Health (1919-1921), Charles B. Ball, C. E., Chief, Bureau of Sanitation

The Interest of Health Departments in Zoning

The methods of zoning, which have already been adopted in some American cities and are being formulated for numerous other cities, sustain such a vital relation to the health and social welfare of the people that no health administrator can afford to neglect any opportunity to observe the beneficient effects which such methods are producing or to refrain from exercising his influence to secure for his own community the speedy adoption of a complete and comprehensive districting plan.

The health advantages which result from zoning are:

"1. The gradual separation of districts in which the most notable industrial nuisances, such as smoke, odors, noise, dust, soot and vibration prevail, from the districts used for residential purposes.

2. The prevention of store intrusions which bring with them into residential districts nuisances similar to those named above, but less annoying in degree.

3. The arrangement of districts in which industries that do not produce nuisances may be located within walking distance of the homes of those employed in them, thus decreasing congestion of transportation facilities and the transmission of disease due to overcrowding in conveyances.

4. The increase of open spaces surrounding buildings, especially dwellings, so that a greater degree of sunlight and air circulations around and in buildings will be available, and the stimulating influence of green grass and trees may be afforded.

In arguing for the desirability of a zoning ordinance, Hon. G. A. Jordan, Assistant Health Commissioner, St. Louis, writes as follows:

"The observing person must be impressed, in contemplating the arrangement of the average city, with the very distinct advantage of some supervisory control which would prevent the haphazard go-as-you-please conditions that continually meet the eye. Canyons formed by skyscrapers on either side of whole city blocks, resulting in darkened streets, never, or for most brief periods, bathed by sunlight, the interior rooms of such buildings darkened and dependent upon artificial light and lacking proper ventilation; in other blocks one or two very tall buildings adjacent to buildings of two or three stories; boulevards whose beauty is destroyed by shops, factories and offensive industries; residential districts invaded by industries that impair property values; irregular arrangements of streets, congestion of living and transportation, all cry out for some supervising power that will prevent chaos and restore order, or at least prevent further chaos. Aside from the offense to the eye, which is the first impression, it is vital that regulations be established to conserve and protect community health, for no one thing is as valuable to a community as the health of those who compose it."

Extract from Report of Commission on Building Districts and Restrictions of New York City, 1916

From the point of view of public advantage the distribution of population is very important. Most of the evils of city life come from congestion of population. In precisely the measure that the city's population can be distributed will those evils be mitigated. As the number of families housed per 50 feet lot increases:

(1) The provision of light and air, so essential to health, vitality and comfort decreases.

(2) The opportunities for personal contact and thus for the spread of communicable disease increase.

(3) Noise and confusion incident to increased street traffic increases.

(4) Each family suffers more and more from the noises from neighboring families.

(5) Privacy is diminished.

(6) The children have less and less opportunity for outdoor play.

(7) The danger from fire, both to life and property, is increased.

(8) The transit lines become more and more congested during the rush hours.

It is therefore essential in the interest of the public health, safety, comfort, convenience and general welfare that a housing plan be adopted that will tend to distribute the population and secure to each section as much light, air and relief from congestion as is consistent with the housing of the entire population for a considerable period of years within the areas accessible and appropriate for housing purposes.

In order to provide the people of the city with the kinds of homes that they desire, are willing to pay for and that will bring the maximum advantage from the point of view of public health and safety, it is absolutely necessary to district the city in such a way as to encourage and conserve particular types of building in particular sections.

Many men and women would be unable to stand the strain of city life were it not possible for them to live in the more quiet, less densely populated sections. A detached house with yard and garden has kept some from breaking down under the nervous strain and has contributed to the efficiency and vitality of many others.

It is important from the standpoint of citizenship as well as from that of health, safety and comfort, that sections be set aside where a man can own his home and have a little open space about it. It makes a man take a keener interest in his neighborhood and city. It has undoubted advantage in the rearing of future citizens. The setting aside of sections for this detached dwelling type is necessary in order to retain within the city many citizens who would otherwise move to the suburbs. The retention of the citizenship of a greater proportion of this class of its business men is of great importance, not only as regards the city's taxable values, but also as regards civic interest and civic leadership.

Extracts from Statements of Dr. William A. Evans, Health Commissioner of Chicago, Published in "Studies on Building Height Limitations," by Chicago Real Estate Board

I will talk particularly to the subject of the need of sunlight in relation to colds, coughs, influenza, bronchitis and pneumonia.

First, I want to bring to your attention a series of charts showing the trend of health in Chicago during the last fifty years.

When we come to analyze this chart more closely we discover a remarkable fact:

First, that the improvement in health in the fifty years has been due to improvement in summer health; winter health is about as bad as it was fifty years ago.

Analyzing further, we find that there has been great improvement in the health as regards typhoid fever, diarrhea in children and death of babies under one year of age—types of causes largely responsible for the old time high summer mortality. On the other hand, a study of bronchitis, influenza and pneumonia shows that those diseases are far worse than they were in the 1870 decade.

This study proves two truths—First, we have controlled every disease against which we have seriously contended.

Second, in a half century in which we have almost wiped out typhoid, pneumonia and its closely related maladies have become materially worse.

In all the list of germ-caused diseases, the only group that is not coming under control—in fact, is not practically under control—is the pneumonia groups, the acute respiratory infections.

We know about what to do—in fact, we have more scientific information than we had as to typhoid fever when we decided to act in a large way against that disease.

Are we willing to approach the question of the height of buildings from that point of view?

There are several kinds of efforts that must be made to meet the problem of the acute respiratory diseases:

To enumerate:

"A—Effecorts against the disease directly—such as reporting, hospitalizing, intermediate and terminal disinfection, laboratory diagnosis, vaccines, curative sera, epidemicologic, procedures.

B—Efforts to improve vitally winter sports—vacations, better habits and customs.

C—Efforts to improve the environment—ventilation, smoke-prevention, street-cleaning, prevention of spitting, sunlight and air streets, zoning limitations of height of buildings.

The limitation of the height of buildings relates itself to problems of the acute respiratory diseases by reason of the decrease of sunlight, diffused light and air circulation on the pavements and the atmosphere between the buildings, and by reason of the interference with light and air inside them, and also by reason of the congestion on the street cars during the peak hours.

The surface of the pavement and the lower stretches of the atmosphere are being constantly polluted. Sunlight and drying are needed to sterilize it. If it is not so sterilized, we suffer infections, principally of the respiratory tract. The sun is less efficacious in the sterilizing process in the winter, because of the short effectve day (7 hours of effective disinfection as against 13 for summer) the more pollution of smoke, dust."

Extract from Statement of Dr. M. A. Bliss, of St. Louis, Published in "Zone Plan of St. Louis," by the Planning Commission

Districting or zoning presents to a specialist on nervous and mental disease many very attractive possibilities. Nervous disease is largely a product of cities; it does not flourish in the wide, sunlit, quiet country. As a matter of common observation, nervousness produced by conditions in large centers disappears if the sufferer is removed to the country. Why? Any one will reply: Fresh air, sunshine, quiet sleep, freedom from noise, dust and smoke.

By taking thought we now provide ourselves in cities with as good water and food as are to be had in the country. We attempt by ordinance to limit smoke and dust. Where we have failed to provide the condition necessary for sunshine, free air, quiet places to live and sleep are largely in the indiscriminate jumble of factory, store and residence and in attempting to crowd into a space adequate for ten people ten times as many.

If we make a clear separation of business and factory from the places where we live and where our children play; if we get away from twelve to sixteen hours from the rattle of machinery, the grinding of cars, the pounding of hoofs, the slamming of boxes on and off trucks, then nature has time and opportunity to restore the fatigued nerve cells and we issue from our homes in the morning fresh for another turn on the front line.

Within the recollection of the middle-aged the systems of rapid transportation have scattered the people of cities over large areas but no consistent plan has been adopted in our large cities to secure a separation of living from working areas. The man who establishes his home on a modest street, expecting to live in quiet and free from nuisances where his children may play in floods of sunshine and open air and in safety from the hurried traffic of business, is entitled to protection from the encroachment of livery stables, garages, factories and stores. The nervous stability of the worker and his family will certainly be enhanced by such protection. Work will be better done, and more of it. Children will grow up in better health and less inclined to nervous instability which so often finds its expression in the feverish pursuit of excitement."

PUBLIC MORALS AND GENERAL WELFARE

From Statement to City Council of Cincinnati of Hon. Charles W. Hoffman, Judge of Court of Domestic Relations, Hamilton County, Ohio

To no one institution is the proposed zoning ordinance more significant than that of the Juvenile Court, which deals almost exclusively with dependency and delinquency as manifested in children.

Comparatively recent research has disclosed that many of the causes of delinquency which we thought were congenital or hereditary are in fact the effect of unwholesome environmental conditions. The factors that distort a child's personality and finally lead him into a career of delinquency and crime may be found, it is true, in the homes of the well-to-do and in the wide open spaces, but the records of practically every court in this country dealing with childhood, reveal that the great majority of delinquent children come from the congested districts, where

families are crowded in houses with dull and forbidden exteriors, with no yards and little, if any, play spaces. Children invariably respond to the nature of their immediate physical environment. If conditions are repulsive and forbidden, the child's life will develop likewise. If conditions are wholesome, the child's chances for happiness and a useful career are tremendously increased.

We have prepared a chart indicating the wards of the city from which the delinquent children come into the Juvenile Court. It will be observed that delinquency prevails to a greater extent in those districts in which social and housing conditions are below the minimum requirements for normal child life.

PUBLIC CONVENIENCE AND SAFETY

From Report Made to the National Conference on Street and Highway Safety, Called by Secretary of Commerce, Herbert C. Hoover, and Held at Washington, D. C., December, 1924, by Committee on City Planning and Zoning Appointed for the Purpose by Secretary Hoover

Experience with the constantly growing volume of vehicular traffic makes clear that if we are to decrease the hazard to life and property or provide for the traffic needs of the future we must plan our street and highway systems and must design the individual thoroughfares with these ends in view.

The Committee therefore submits the following recommendations:

Summary of Recommendations

1. Street and highway hazards are due chiefly to vehicular traffic. These hazards can be greatly reduced by a *proper arrangement of streets and highways.* Consequently each community must necessarily study and carefully consider its own special problems with particular emphasis upon (the report enumerates the several causes of street congestion and danger, among which is):

5. *Relation Between Street Facilities and Development of Private Property—Zoning.*—Each community should, in determining the character, width and arrangement of its

streets, at the same time determine, through zoning, the character, use and bulk of abutting buildings.

Each community or group of communities in planning the main arterial highway system should take account of the effect of zoning regulations in regulating and stabilizing traffic flow.

(The report then proceeds to discuss each of the topics, the fifth being):

Relation Between Street Facilities and Development of Private Property—Zoning

It is obviously impossible to plan for adequate street facilities if there is no way of determining the demand which will be made upon those facilities. To widen streets in a congested area or even to increase the number of those streets is patently futile if the widening or increase is followed by an unforeseen increased intensive use of abutting property demanding still further increase of street facilities. It is equally impossible to plan for adequate outlets or arterial thoroughfares from a traffic-originating center if there is no way of estimating with a fair degree of accuracy the volume of traffic which may be expected to flow from and to this center.

As the volume of traffic upon a given street (excepting through or arterial highways) depends chiefly upon the use made of abutting property, there is an ascertainable relation between the character, use and bulk of abutting buildings and the needed traffic capacity of the street.

From the Report Adopted by the National Conference on Street and Highway Safety, 1924

The growing toll of street and highway accidents has become a great national problem, reaching in 1923 a total of 22,600 deaths, 678,000 serious personal injuries and $600,000,000 economic loss; an increase of 80 per cent. in the past seven years. About 85 per cent. of these accidents were incident to automobile traffic.

This is a national loss of so appalling a character as to warrant the most complete consideration and effort at drastic remedy. Such treatment is also essential in order that the full public benefit from this new system of transportation shall not be jeopardized because of accidents and congestion.

The Conference on Street and Highway Safety, including police officials, highway and motor vehicle commissioners, insurance companies, railroad and street railway companies, safety councils, chambers of commerce, labor unions, women's clubs, automobile associations, automobile manufacturers and various other national groups, was called by the Secretary of Commerce for the purpose of determining the essential facts and promoting better organization and co-ordination of activities in the reduction of accidents.

During the past six months eight representative committees have been engaged in the investigation of the facts of current practice and the most successful methods of reducing accidents. Their investigations cover (I) Statistics; (II) Traffic Control; (III) Construction and Engineering; (IV) City Planning and Zoning; (V) Insurance; (VI) Education; (VII) the Motor Vehicle; and (VIII) Public Relations. The reports of these committees, after widespread distribution and public comment, have been given detailed consideration by this Conference. They contain recommendations on which essential agreement has been reached and which, if carried out, even in part, will effect an immediate reduction in the accident toll.

* * * * *

The Conference recognizes the need for fundamental preventive measures involved in comprehensive city planning and zoning. Unless there is proper control of the development of private property, it is rarely possible to provide street and highway facilities adequate for future needs.

City Planning and Zoning

Street and highway hazards are due chiefly to vehicular traffic. These hazards can be greatly reduced by a proper arrangement of streets and highways. Consequently each community must necessarily study and carefully consider its own special problems with particular emphasis upon:

(a) The problems presented by streets and highways crossing each other at grade or crossing railroad or rapid transit lines at grade, with the two purposes of reducing the number of crossings by a better arrangement of transit lines and thoroughfares and by separating grades so far as practicable where crossings remain necessary. Elimination of grade crossings is most needed along major traffic arteries or boulevards.

(b) The problem of classifying traffic and of providing suitable and adequate facilities for each class. This involves the proper location of the various kinds of development; industrial, commercial, resdiential, through a proper planning of traffic and other public facilities provided in the various areas, supplemented by zoning regulation of private property.

(c) The location of its traffic centers and the possible development of its outlying areas with the two purposes of straightening main traffic arteries and of so spacing them that there will lie between them areas sufficient in size to support neighborhood stores, schools and recreation facilities.

(d) The possibilities offered by its topography and its present development to create by-pass highways and belt highways which will permit through traffic, especially trucks, to avoid congested districts or even any built-up portions of the city or town.

(e) The control of subdivisions to avoid in the future the types of streets which tend to congest traffic and cause accidents.

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Relation Between Street Facilities and Development of Private Property—Zoning

Each community should, in determining the character, width and arrangement of its streets, at the same time determine, through zoning, the character, use and bulk of abutting buildings.

Each community or group of communities in planning the main arterial highway system should take account of the effect of zoning regulations in regulating and stabilizing traffic flow.

Extracts from Paper on "The Influence of Zoning on the Design of Transportation Services," Read by J. Rowland Bibbins, Engineer of Washington, D. C., to the October, 1924 Meeting at Detroit of the American Society of Civil Engineers

Meanwhile, cities are experimenting with block signals, one-way streets, etc., usually without adequate facts, surveys, or design, and in desperation, the police adopt no parking as the "last resource."

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This is not engineering; it is a stampede. Where are the sober facts, surveys, and carefully worked out plans of experienced authority that justify such drastic measures from a technical or economic viewpoint? The cost of planning would be microscopic, relative to the saving.

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Functional Purpose of Zoning in Transportation.—In order to distribute population rationally, reduce central congestion, relieve trunk thoroughfares of traffic "nodules" or bunched congestion, make possible adequate transportation, speed up that service, and reduce economic waste. What is the measuring stick of "density"? For on the density rests the transport capacity needed. If the limits are too easy, transport lines are overloaded, streets can not carry their burden, transit is stagnated. It is no solution to invade other streets of the city with many new lines of traffic of equal inefficiency, even if such new lines could be financed. Obviously, to obtain adequate street and transit capacity, higher and higher zoning limitations are required. The widening of a few streets or a few blocks in the central district will not suffice for, immediately, the building height limit shoots skyward several times faster. The outside zoning density standards in the end, form the major control.

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Conclusion.—Zoning is vastly beneficial to orderly development, checks glaring misuses, and, as now administered, will ultimately exercise a restraining influence on mass density, but unless standards are raised, it can not hope to turn the tide of growing congestion promptly enough to meet obvious traffic needs of the immediate future.

From "Some Aspects of the Automobile Industry," by Alvan Macauley, President of the Packard Motor Car Company, Detroit, Mich.

The New Saturation Problem

The fundamental traffic problem is the problem of the city plan. Traffic crowding, delays, accidents, high taxes for police purposes and relief streets, high costs of deliveries of food—all these problems and many others can be traced in large measure to the planlessness of our cities.

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Better City Planning—A Vital Need of the Automobile Industry

The possibility of a physical saturation point for automobiles in cities and the urgent need of measures to cope with traffic congestion have increased the interest of the automobile industry in city planning.

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It is the work of the city planner, therefore, to decide the nature and the extent of the traffic that is to move about the various parts of the city and to lay out the streets in relation to this movement; and to decide the nature and extent of the traffic which is to use each individual street and to base on these forecasts its width and other structural characteristics.

An increasing number of cities have found that it is not necessary merely to forecast their development, but also to control it. By means of "Zoning" plans and regulations a city can, with flexibility and yet with conscious determination, decide in what directions it had best grow and for what purposes each section had best be used. Cities are also exercising increasing control over the plotting of suburban areas—the suburb of today becomes "the city" of tomorrow.

From Paper of Morris Knowles, Consulting Engineer, Chairman, City Planning Commission, Pittsburgh, Pa., on "City Planning as a Permanent Solution of the Traffic Problem," read at the International Town and City Planning Conference, New York City, 1925

Remedies to be Applied.—The remedies to be applied are of two distinct classes: First, those which deal with the regulation and supervision of traffic, and second, those which deal with physical construction—and the planning of improvements. The former may be considered as fitting the traffic to the streets, and the second as fitting the streets for traffic. The first is merely a palliative, it is only using the tools which we have to the best advantage. To plan is to provide the tools.

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The permanent solution of the traffic problem involves three questions: First, the replanning of our cities to

solve the question of the congested and built-up district; second, the provision of sufficient facilities in the now undeveloped territory, so as to prevent congestion when these districts become more built up, and third, the planning and rearrangement of an entire region, so as to alleviate the conditions which now exist.

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Zoning.—One of the most important features of city planning in its relation to traffic—although perhaps not thoroughly realized—is that of zoning, or "the creation by law of districts in which regulations, differing in different districts, prohibit injurious or unsuitable uses of structures and land." Zoning attempts to give stability to the general plan. It sanctions where the residents should live and sets forth areas to be devoted to stores and industries.

The traffic needs of a community involve: First, the distribution of traffic within that community; second, the methods of getting traffic to and from the community; and third, the method of getting traffic around the center of the congested area without passing into it. Since zoning tends to give permanency to the city's development, it plays an important part in determining the street system. The character of a district determines, to a large extent, the type of streets required to meet the particular traffic need.

The factory districts, for example, will be interested in getting materials delivered to the factory and from the factory to shipping points and transportation centers. Their need is for wide heavy-hauling streets and generally the problem is that of caring for slow-moving traffic.

In the business districts, which are the principal objective points of all inter-city traffic, the question is largely one of arterial distribution within the district, with main exists and entrances. If the principal streets are stabilized as to use and thus as to value, it will more surely fix the improvements and provision for transportation requirements.

In short, to intelligently design a system of streets and to make them relatively permanent and, therefore, as nearly fixed as possible, requires zoning, so that the planner may be certain as to the kind and character of the traffic the streets must carry.

Thus zoning enables sensible planning of thoroughfares of sufficient width and of a type to meet the requirements of different kinds of development, so that it will not be necessary to first build, then tear down and rebuild.

From an Address on "The City, Its Past and Its Future," Delivered at Birmingham University, by Dr. Raymond Unwin, of the British Ministry of Health

The real advantages of community life can not be secured by adopting the methods of the thrusting crowd or the grasping scramble, and such methods should no longer be tolerated as the basis of civic life or town development.

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From the present method of haphazard growth, a disorderly muddle of industrial, commercial and residential areas or buildings inevitably results. As further accretions develop on the outside, many of the advantages which lead to the selection of particular sites are taken away. In the built-up area of each large town there ensues a continuous struggle of the different parts to re-sort themselves on some more rational basis; and every move is accompanied by the sacrifice of something which has gone before.

Overcrowding solves no problems; in whatever form adopted it creates new difficulties; that is our first lesson.

The second is that in essence the problem we have to handle is one of distribution and localization; the proper distribution of the parts of the town in relation to each other and to the site, and the localization as far as possible of the life of the people in each part.

In existing towns the disentanglement of the confusion of parts and buildings which has resulted from haphazard growth must take time; but this proper distribution of parts must underlie all our planning if it is to be on right lines. Better distribution and greater localization of life offer the only solution of the present traffic problems. It has become evident that there is no solution to be reached by merely multiplying facilities; each in turn is liable to increase the congestion by bringing people to the center, as much as it relieves it by taking them out, is liable, merely to increase the volume of movement. Bad distribution simply means that things are in wrong places. A large proportion of the different sections of the town, and many of the buildings which give rise to heavy transportation, being in the wrong places, much of the congestion of traffic is entirely due to the unnecessary moving to and from of goods and people which results.

The volume of traffic in large towns will be great in any case, but it can be reduced by good distribution, by decentraliziation and by localizing the life of the people in each decentralized unit. There will still be need to study carefully the many new methods of transportation now available, and using each for the kind of service for which it is best adapted, to frame the whole scheme to give adequate facilities for such movement of men and things as may prove to be necessary or desirable. So long, however, as our towns were permitted to spread out indefinitely over the surrounding territory in a dense mass of streets and buildings, industrial, commercial and residential parts indiscriminately mixed up and packed together, so long must the life in our towns be one vast disordered confusion of people rushing backwards and forwards over the whole area, impeded by the congestion which results from this cross transport of men and things.

From Memorandum on "Zoning in Built-Up Areas," by British Town Planning Institute to London County Council

1. The following memorandum has been prepared by the Council of the British Town Planning Institute in response to an invitation by the London County Council to place before it the views of the Institute upon the subject of zoning in built-up areas, with special reference to London.

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7. The great and increasing inconvenience of traffic congestion which is so evident in all our large cities, and particularly in London, is, perhaps, the most important instance of the result of attempting to deal with urban problems in watertight compartments. The present confusion and congestion in our streets appear to us to be largely due both to the amount of unnecessary traveling that now takes place owing to the disordered mingling of all kinds of buildings without regard to the relationship between their function and location, and to the fact that the uncontrolled change of character in buildings frequently renders streets, designed to serve the traffic arising out of the original user of the frontages, completely inadequate to deal with the traffic caused by a change of user. From the economic standpoint it is obvious that the width and construction

of streets should be determined in relation to the character of the buildings in the districts through which they pass, and in our view no satisfactory solution of the traffic problem can be arrived at until the improvement of the street system in a town is undertaken in conjunction with zoning as part of a general town plan.

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10. The effect of zoning upon land values is very largely a matter of surmise. The view that land values would suffer depreciation as a result of such restrictions being imposed is based upon the assumption that complete freedom in the matter of user is a considerable factor in the value of land. While this is no doubt true from the point of view of the land speculator operating in a town where conditions are undergoing rapid changes, it is probably not a factor of much consequence where changes in the character of property are gradual and where all the land is subject to zoning restrictions. In fact, under the latter conditions it appears to be much more probable that the added security afforded by zoning would have the effect of increasing land values. In residential areas considerable value is attached to the preservation of amenity, as every large landowner has recognized in his private restrictions. In the case of land used for commercial purposes, a certain degree of concentration and the existence of good traffic facilities are both elements of value which would be improved by zoning as part of a comprehensive planning scheme.

PUBLIC SAFETY

Statement by Edmund Dwight, Resident Manager, The Employers' Liability Assurance Corporation of London, May 18, 1916, to New York City Commission on Building Districts and Restrictions

As an owner of property in various parts of New York, I am satisfied that while in individual cases there might be some hardship, resulting from the proposed system, it should work as a whole to the enhancement and stability of real estate values, and to the great welfare of the community.

The plan of this commission provides for certain residential streets from which trade and industry will be excluded. This, in my judgment, will undoubtedly tend to reduce the

frequency of street accidents. Manufacturing operations carried on extensively in sections of the city which are also used for residential purposes and which involve an extensive use by truck, vans and express wagons, in residential streets, increases the number of accidents in the street. I believe that the same would be true if the mercantile use of the streets could be eliminated or reduced in residential sections.

From Statement of John Kenlon, Chief of Fire Department of New York City, to New York Commission on Building Districts and Restrictions, 1916, on Relation of Zoning to Fire-Fighting

Congestion of traffic and population and haphazard building make the city's fire fighting problem increasingly serious. It becomes increasingly difficult to move fire apparatus through the congested streets. Streets densely packed with crowds of people that quickly form wherever a fire occurs, interfere with prompt service after the scene of the fire is reached. If a serious fire should break out in lower Manhattan coincident with an explosion or earthquake shock that would cause a general panic and outpouring into the streets, it might be utterly impossible for the firemen to reach the fire and a terrible conflgration might result. This is the plain truth and it is fool-hardy to utterly ignore it and go on piling up buildings and further extending the danger zone. The districting plan will, as to future growth, tend to spread out business and industry, both by limiting the height of buildings and by encouraging the development of commercial and industrial areas in the other boroughs.

In the thirty years that I have been connected with the fire department, lower Manhattan has changed from a five story city to a twenty-five story city. There is great confusion there at the present time; during the daytime it is difficult to move apparatus in response to fire calls in the lower end of Manhattan Island. Increased congestion of people and traffic in this section will cause very serious delays in getting apparatus to work around the scene of fire. Any plan that will in a measure prevent the increase of congestion in the central portions of the city is a plan in the right direction.

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If you can confine stores to broad avenues and good substantial buildings and reserve side streets for residences, there would be a great deal less danger from fire. I think you are on the right line for the health and safety of the people in establishing residential and industrial districts.

Segregating buildings according to occupancy in different sections of the city will restrict the area in which a conflagration can occur. It will be a help to the Fire Department in laying out and equipping fire houses. I think it will greatly lessen the cost of fire protection.

If we can apply to the outlying sections provisions that will prevent so great a percentage of the lot being covered by buildings, by laying out wider yards and courts, the safety of the city will be promoted. Such a plan would tend to prevent the spread of fire. Where the area of the yard is increased on both sides and the courts are larger the danger of the spread of fire is considerably less.

Extract from 1925 Fire Prevention Year Book of Baltimore, Maryland, Underwriters and National Agent

Outside of individual cases let us consider the relationship of zoning to fire department work and fire prevention generally. In every city of any considerable size is a high hazard district, where spread fires are possible and probable. In these districts, in many cities, there is a provision in the building code or other law against the erection of any frame building. Many of these cities, even outside of this area, and where frame structures are allowed, require that any such frame structure must be built a certain distance from any other building, and which varies from ten to fifty feet. This frequently stands whether the original building is of frame or of fire proof construction. Good zoning might probably allow the introduction of a certain class of business, if the structure is built in conformity with the distances set down in other city regulations for safety, but may properly refuse the introduction into the community of a higher hazard business.

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It is probably entirely good zoning to require certain set-backs from building lines and certain side-yard spaces

in residential areas of the suburban type, not only for the usual reason of preservation of the character of a high-class zoned area, but for health and fire hazard reasons. Such areas are usually less protected by concentrations of fire apparatus than are the built-up sections of a city, fire alarm services are frequently carried overhead, instead of in conduits, and are thus subject to disturbance from the elements. Sweep fires in such areas are certainly less likely when each building is protected by free space. Especially when business houses are to be erected in an area district which requires one or two side yards and set-backs from the front building line the fire hazard is patently lessened. In high value business districts such protection would be possibly unreasonable, especially if in close contact with districts where the established procedure is to the contrary, but the requirements may not be unreasonable in newly-developed territory, especially where the commercial use is merely an adjunct to residential service, such as grocery, notion or drug stores.

Each experience teaches that the safest form of residence from a fire prevention viewpoint is the single-family house. There is usually less of trash accumulation and more care in handling inflammable material when the owner of the house and his immediate family only are concerned, than when there is a mixed occupancy.

The question of families per acre involves many considerations of hazards of life, or public safety. It is therefore entirely good zoning to prevent over-congestion, as far as possible, on a fire hazard basis and, in addition, to thoughts of health protection, etc.

Height restrictions can very well be considered vital zoning from a fire hazard viewpoint. It has been clearly demonstrated that a spread fire can involve so-called fireproof structures. * * *

* * * In sustaining a special act which limited construction to not more than 175 feet in Baltimore, Judge Worthington, in the Court of Appeals of Maryland, dwelt upon the ravages of the 1904 fire, and added: "Great impetus is given to such a fire by very tall buildings. They serve as so many large funnels, furnishing draft for the flame, thereby intensifying the heat, and outreaching the efforts of the fireman." Thus it would seem that height

restrictions are entirely good zoning within the police powers, as interpreted by this court.

The fire hazard must always be measured not only by the condition and amount of inflammable property, by the strength of fire-fighting forces of the particular community, and by the liability of the community to unusual wind and other elemental disturbances, but by the water supply of each particular area. It is a potent fact that the average main put in for a residential community may be entirely inadequate to take care of the fire department needs when a large industrial plant, or a series of such plants, which have invaded a strictly hitherto residential area, are food for flames. How many times does one read in the daily press about inadequacy of water supply after some large plant is destroyed in the outlying section of some large city. In many cases the water mains were originally laid for a scattered suburban supply, or a strictly residential drawoff, and the line is inadequate for fire service beyond a certain point. * * *

It can thus be seen that intelligent zoning is definitely tied up in relation to the fire hazard to the ability of the city to extend adequate water supply in particular areas. There is a very distinct fire hazard in the introduction of a business area, or an industrial area within a district zoned residential and provided with water supply for residential use.

Fire department statistics all over the country show that there is an increased hazard with the introduction of business. A building which is used for joint business and dwelling occupancy is more liable to fire than is one which is used for residence only. Again, a building used entirely for business purposes is a greater fire hazard than either the partial occupancy or the dwelling, in relation to the proportion of fires in regard to the number of occupancies in the entire community.

The fire department records of one large city were secured recently as an example of fire hazard and zoning needs, and some interesting deductions made. First, there was a study of fires in buildings having combined residence and business. It was found that there were 273 fires in a stated period in such occupancies. * * * During the same period there were only 1,182 fires in residences in the entire city, and the fires in combined residence and business uses were out of all proportion to those in resi-

dences only, when compared to the number of combined residences and stores, on the one hand, and the total number of residences, on the other, in the entire city.

About the same proportion of fires also existed for the period as between buildings used for apartments and stores jointly and those used for apartments only. * * *

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There can be no doubt that zoning has a distinct relation to fire prevention. The planning for work of fire departments and water departments is simplified where intelligent zoning maps out ahead its occupation of areas, and prevents haphazard invasion of areas restricted to residence or light commercial areas, as differentiated from industrial areas, and holds its restrictive area variations to the necessities of business and industrial growth and encroachments along common sense zoning lines so that no practical difficulty or unnecessary hardship is created merely for estheticism.

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"* * * Water engineers tell us that the distribution system, no matter how carefully designed, may in the course of time prove inadequate without some control over uses of property and an assurance that those uses will be stable. The distribution structure is almost unalterable to meet changing needs, and if inadequate must be replaced. The size of a water main necessary to supply a residential development is smaller than is required to supply a neighborhood which is interspersed with stores. As the number of business houses increases, the size of the water main must be increased, until the high value commercial district is reached, which is approximately the downtown business district, where the maximum supply must be provided. Mr. Siems says further: 'In order to design a water distribution system intelligently the character of the future development of the community and the location and widths of proposed traffic arteries must be known. Small mains have been laid into new territories on the theory that the demand will be slight, only to be replaced by larger mains when the territory became more closely built or its character changed. Where a system of city planning is followed the future consumption in a newly-developed territory may be anticipated. * * * A determination of the size of the feeder main extension to be economically installed may be made in advance.'

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"Summing up the opinion of the water engineer, his own words are as follows: 'A revised method of determining required fire flows has been developed which should be applicable to all conditions. From investigation it seems that the required fire flow is the criterion upon which the pipe capacity of any gridiron system should be based. To insure an economical and permanent design, anticipation of the development of the territory to be supplied should be made possible through the adoption of a definite scheme of zoning.'

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"Absolutely, the design of the water distribution system for fire protection and for domestic and manufacturing consumption is dependent on a definite plan for the use of property and on the height and bulk of buildings."

HOUSING, LIVING CONDITIONS, RECREATION, GENERAL WELFARE AND PROSPERITY.

"How Zoning Prevents Blighted Districts," by Edward M. Bassett, Member of Zoning Commission of New York City, and of Department of Commerce Advisory Committee on Zoning and City Planning

What starts blighted districts? Before the days of zoning they started almost over night. A residence block or a bright group of small stores would be invaded by a large stable or garage, or by a junk yard, milk bottling works or fume producing factory. The well-to-do owners would sell out and go elsewhere. The old houses and stores would be reoccupied by people who would let them run down. The stores would be taken for small industries and would go from bad to worse. It was almost impossible to stay the decline of a blighted district when it once got started. Some property owners lost a fortune trying to do it. The blighted district was usually started on its way by the invasion of one or more uses that were out of place in that particular locality.

Every part of the city was open to the exploiter. He could erect a building of any size, height or shape in any place and put it to any use however hurtful to the neighborhood. Sometimes it was storage of trucks in a good tenement district. Sometimes it was a six-story tenement in a locality of neat small cottages. Sometimes it was a

metal factory in a home district. Frequently a varnish or paint works or some other nuisance factory would buy an acre or two of land in the suburbs and establish itself in the heart of what ought to become an area of small homes. When the growth of the city forced home building in that direction the good homes would avoid the factory. The surrounding twenty or more acres would be left vacant for a time and then perhaps build up with cheap and squalid structures.

The zoning plan put a stop to this chaotic building. Invasions of harmful buildings and uses were prevented. Business districts are protected against industry, apartment house districts against business, and cottage districts against apartment houses.

Leaflet on "City Zoning is Sound Business," by John Ihlder, Manager, Civic Development Department, Chamber of Commerce of the United States

Advocacy of city zoning regulation has swept across the country during the past three years until today nearly one hundred cities and towns have adopted zoning ordinances or are at work upon proposed ordinances. Every week brings word of other communities which have become interested. Until the present year there was practically no opposition to zoning as zoning, but only to specific provisions in individual ordinances. This, of course, was a condition which could not continue. No proposal which undertakes to guide the action of others than its sponsors can go long unchallenged. So zoning is being challenged.

The fact that it is being challenged is cause for general congratulation in which its sincere advocates must join, for no proposition is so fool proof, so free from the possibility of error, that it can safely be left entirely in the hands of those thoroughly committed to it. For the past year and a half at least, some of these advocates have been watching with misgiving the speed and ease with which some communities have adopted ordinances, and they welcome the questioning which will bring to light defects in specific ordinances and so result in sound, constructive legislation.

Zoning has a sane, common-sense purpose—so to guide the development of a city's area that each part will be put to the most effective use and the whole community benefited by the substitution of system and order for chaos

and disorder. This it seeks to accomplish by dividing the city's area into three kinds of districts—use, height and area. Each of these kinds of districts is then classified; for example, use districts are classified as residential, commercial, industrial. There may be one or there may be many districts of each class, depending upon the city's size, topography and present development. Any one district may be as small as a single block or square—though, except in outlying residence districts where a four-corners is classified as commercial in order to provide for neighborhood stores, the smallest size is rare—or it may be quite large, though here again a limit is necessary in order that an industrial district, for instance, may be readily accessible from a workman's residential district.

The opposition to zoning so far seems to be due to two main causes: the natural opposition to any check on freedom of action, and the belief that zoning will prevent the greatest possible profit from an individual property in which the objector is interested. These are both legitimate causes for questioning a zoning ordinance, and the framers of the ordinance must take them into account. But the question whether to zone or not to zone can not be answered upon the basis of these two point only; it must be upon a wider basis.

The advocates of zoning put their case upon this wider basis. They assert that the unregulated development of our cities has resulted in a degree of confusion which causes constant loss of surprisingly large amounts both in operation and in capital account. This is, of course, most obvious in the largest cities. As one goes from them down to small cities and towns the loss becomes less apparent and to a considerable extent less real, until in villages it would be ludicrously pretentious to have an elaborate system of zoning. So, too, in private business, the careful thought which goes into distinctions between the departments of a great metropolitan department store would be ludicrous if applied to the general store of a village. Yet even the latter, small as it is, limited as are the varieties of goods in stock, simple as is its operation, benefits by a regime which values system and order. For the small town, zoning may be reduced to very simple terms. Yet, though the small town, like the mechanic who has only a dozen tools and so can remember where he left each one, may not find it very important to have a place for everything and to put every

thing in its place, system becomes important if the town grows into a city or the mechanic becomes proprietor of a large shop. And early habits of carelessness are hard to change.

The losses in operation due to lack of zoning may be divided into two groups: Those caused by effort and time wasted in overcoming non-contributing distances and crowds, and those caused by inadequate facilities.

So great is the loss caused by non-contributing distances and crowds that throughout all city history different kinds of businesses have tended to segregate themselves. But such blind and groping efforts have been only in small degree successful. New York, for example, has long had its so-called financial district, various wholesale districts, its great retail districts. Yet New York was the first American city to adopt a thorough-going zoning code. For New York's subway riders, from bank president to office boy—so great is the crowding now that even high-salaried executives have to abandon their automobiles far up town if they expect to reach the office before closing hour—must journey past miles of business buildings which mean nothing in their business lives. And having reached their subway destination they must slowly push their way through crowds of people with whom they will never have any contact, except a too close physical contact. Zoning seeks to reduce this loss by supplementing the blind efforts of the past with a carefully worked-out system that will give the maximum of convenience and accessibility to business.

At the same time zoning provides the possibility of increased facilities. The needs of heavy manufacturing, light manufacturing, retail trade, and of residence are different. To mix all these in one district is obviously wasteful of opportunity and wasteful of resources. To put dwellings along the line of a railroad from which spur tracks may readily be run is a detriment to the occupants, who suffer from noise, smoke and cinders, and it is a handicap to a prospective industrial plant which must pay for the site not only the cost of land but also of the buildings cumbering it. To put a factory in a residence district not only is likely to entail needless trucking through streets unfitted for such use but diminishes property values on all sides.

To put a noisy or fume-producing industry or an automobile repair shop next to a department store will quickly reduce the latter's trade. Moreover, any such miscellany

of uses will make more difficult and expensive an adequate provision of public services; the best sizes and shapes of blocks or squares are not the same in an industrial district, a commercial district, a residential district. The kinds of street paving required for the three differ, and one kind is far more expensive than another. The sizes of water mains, sewers, lighting conduits differ. Police and fire protection is more difficult in a miscellaneous district. With proper classification the proper building of the city not only becomes much less expensive, but facilities for each kind of district, now impracticable because of conflicting interests, become easily practicable.

This, in brief, is the argument of advocates so far as operation is concerned. But more important is the argument based upon capital losses. There are opponents who contend that the character of a city district changes every ten years and reason from this that a zoning ordinance will be antiquated soon after it is enacted. The come-back of the zoners reminds one of the Scottsman's response to the famous Dr. Johnson's sneer that in Scotland men are fed on oats which in England are given only to horses: "Yes, but see what men we have in Scotland and what horses you have in England." The zoners, too, say: "Yes, but the rapid change in the character of city districts is one of the strongest reasons for zoning. Zoning will slow up this change and so prevent the waste of many millions of dollars worth of buildings that are still perfectly good for their original use but are unfitted for the new use forced by the changed character of the district."

Any man who has kept his eyes open has seen good buildings demolished, has seen old buildings converted to uses for which they are most inefficient, simply because the district has changed. Advocates of zoning claim that most of these changes are unnecessary.

It is to be noted that the advocates do not claim zoning will prevent changes but will simply slow them up. They recognize that a city is a growing body and that changes must take place. So zoning regulations provide that on the initiative of property owners or on that of the public authorities, the boundaries of a district may be changed or that it may be transferred from residential to commercial or industrial. What the regulations do is to prevent one owner from injuring his neighbor by erecting a store or a factory or a public garage in a residence district years

before there is any prospect that other stores or factories or garages would come into that neighborhood. In this way the probable life of any building erected today will be greatly lengthened, and the builder will be justified in investing a larger amount in constructing a finer building.

The argument for zoning, then, is the common sense one that it will prove of practical benefit to the whole community. Granted this, it is still a question whether the particular ordinance proposed for a city is an application of this common sense. Are the areas allotted to industry those best fitted for industry? Are they large enough in the aggregate to provide for future development? Are the areas allotted to commerce adequate in location and size for the city's commercial needs? These are first considerations, for the city was built by and for business. Its future depends upon business. At the same time it must be recognized that business is not an end in itself, but a means to an end.

Business must, therefore, set boundaries for itself in order that it may not spoil the things it buys. If business is to ruin residence districts where men have invested the savings of a lifetime, if it is to make our schools ineffective by erecting next to them noisy, smoky foundries and shops, it is in large measure defeating its own purpose. The zoning regulations, therefore, protect residence districts from such intrusion in order that men may feel greater assurance in invesitng their savings in things that build up family and social life.

Once this argument for zoning is accepted the first of the objections disappears. There is little resentment at the traffic policeman who halts us at a busy corner, for it is obvious that the regulation of traffic benefits us all. As for those who oppose zoning because it interferes with the greatest possible profit for a given piece of land, there are two questions for them to answer: First, will their proposed development be an asset or a liability to the city? Second, will their expected profit materialize if their neighbors follow their example? Usually the argument of this group is based upon plans to utilize a plot of land for a very high building covering a large proportion of the plot, and therefore dependent for light and air upon being surrounded by lower buildings.

In any given district all owners should be assured equal opportunities. The maximum permitted any owner, therefore, should be that which all owners may utilize without

mutual detriment. This, the advocates of zoning say, is not an unreasonable restriction upon private initiative, while it is at the same time a positive benefit to the community.

Statement to City Council of Cincinnati of Bleecker Marquette, Executive Secretary, Better Housing League of Cincinnati

Bad housing has been one of the most fruitful sources of social ills—poverty, disease, immorality, juvenile delinquency, crime, bad citizenship—in our city for the past forty or fifty years. How many millions of dollars it has cost us in maintaining hospitals, orphan asylums, reformatories, penal institutions, courts, jails, no one can estimate.

A study was made here in 1913 to find out where the majority of the inmates of such public institutions came from. A chart was prepared on which lines were drawn to show the place of residence of each inmate. It showed that *70 per cent. of them came from the congested section of the city where 120,000 people are crowded into 6,500 tenements* in 1/19 of the city's area—where the houses are built so close together that there is not enough space for light and ventilation; where halls and rooms are dark and ill-ventilated; where noise, smoke, odors are worst; where children have no place to play except in the streets, subject to constant dangers from passing autos and to the moral dangers of gang life.

Congestion Forces Children Into Streets

Scientific studies show that where the congestion reaches the point such as exists in our tenement districts where there are more than 37 families to the acre, 80 per cent. of the children have to play away from home because there is not yard space sufficient for them.

Every study that has been made in any large city in the country shows that the great source of cases in juvenile courts, in municipal courts, in dependency institutions, in social agencies, is the slums. The infant death rate is higher, the tuberculosis death rate is twice as great in the congested tenement sections of Cincinnati as in the city as a whole.

Mistakes of Past Can Not Be Remedied

No amount of effort will undo the mistakes of the past. Our only hope lies in preventing future slums. Here Cincinnati's outlook is more hopeful than that of most cities. During the past seven or eight years we have been building one and two-family homes in the suburbs, and the basin population had been moving out to the suburbs at the rate of one per cent. per year. Home ownership, although still low in comparison with other cities, is on the increase. We are slowly changing from a city of tenements to a city of homes. If we can continue this development, encourage the construction of small homes with ample space for light and ventilation and their own patches of green and places for children to play, and on the other hand prevent the too rapid growth of huge flat buildings, we can rest assured that the future of Cincinnati's housing is safe.

Nothing to Prevent the Creation of Future Slums

Today there is nothing to prevent the development of worse congestion in the suburbs than any we now have in the basin. Nothing in our present laws prevents the erection of tenements and apartments housing a thousand people to the acre. Nothing prevents the building of one and two-family houses with no space between them, no rear yards, no set-back from the street. We have no way of knowing that the housing of the future may not be as bad as that of the past. Experience shows that where there is no restriction on congestion there is almost no limit to the number of people who can be housed on an acre of land. In New York City, for example, the tenement houses being built today have more families to the acre than in the worst slums on the East Side. Tenements of this kind house as many as 1,000 and even 1,500 people to the acre—three or four thousand to the block. It is possible to have congestion equally great in Cincinnati unless through some medium like zoning we limit the number of families to the acre.

Zoning Will Guarantee Adequate Open Spaces

The proposed zoning ordinance will prevent congestion because it limits the size of apartments and tenement houses and limits the percentage of the lot they may occupy. It encourages the construction of one and two-family houses,

because it sets aside sections in which they are given preference and in which apartment houses are permitted only under safeguards that prevent them from stealing the light and air of smaller houses and from housing too many families. It means the elimination of the dark room because it requires that all windows in dwellings shall open to spaces large enough to guarantee a reasonable minimum of sunshine and ventilation, and because it requires that one and two-family houses shall have side yards, rear yards and a set-back from the street of reasonable dimensions, based for the most part upon the better practice that now prevails.

United States Department of Commerce Advocates Zoning

The testimony of physicians, sanitarians, social service experts and housing authorities to the evils of congestion and the advantages of sunlight, air, play space, small homes, is limitless. Former President Wilson and the late President Harding were staunch advocates of the vital importance of protecting our homes. Secretary of Commerce Herbert Hoover has established in his department a Bureau of Housing which is consistently urging zoning as one of the most important measures in the interest of better homes that could be enacted. Mr. Hoover himself is an earnest advocate of zoning.

Congestion and bad housing is a curse of modern civilization—the great menace against which every large city is fighting, and will fight in vain unless by means of zoning it makes impossible the creation of future slums. Congestion is not the only factor in disease, vice, crime, juvenile delinquency, bad citizenship. Yet so long as congested housing exists, our efforts to eliminate these social ills are doomed to failure.

Well-Lighted Homes Promote Health

"People who are able to live in well-lighted apartments have a physical resistance which is superior to that of people who live in dark rooms. That has been proved under exact experimental conditions in laboratory tests and is matter of common observation among human beings," says Dr. Haven Emerson, former Health Commissioner of New York City, and one of the country's leading health authorities. "The portions of the city which have the small

family house development show a lower death rate than prevails elsewhere in the city, under equal economic conditions. *Children brought up in one- or two-family houses, where there is plenty of land about, are more likely to be healthy* than those brought up in an apartment or a tenement house," says the same authority.

Exposure to a vitiated atmosphere, lack of sunlight, congested housing which brings people in close contact with each other, tend to break down the individual's resistance to disease. Such conditions tend to spread tuberculosis, pneumonia and colds. In the prevention and cure of disease pure air, and especially sunlight, are of the greatest value. More and more ills are shown by medical science to be improved by sunlight treatment, especially rickets and tuberculosis of the bones and joints. Sunlight is beneficial stimulant to the nervous system. It destroys harmful bacteria. Its action upon the air is prophylactic, rendering the air more healthy.

Evils of City Life Lessened by Preventing Congestion

In precisely the measure that the city's population is housed in small homes with adequate open spaces, the evils of city life will be lessened—as congestion increases, the evils of city life increase.

As the number of families housed, for example, on a typical lot 50x125 feet increases—

1. The provision of light and air, so essential to health, vitality and comfort, grows less.
2. The opportunities for personal contact and thus for the spread of communicable diseases become greater.
3. Noise and confusion incident to street traffic increases.
4. Each family suffers more and more from the noises of neighboring families.
5. Privacy is diminished.
6. The children have less and less opportunity for outdoor play.
7. The danger from fire, both to life and property, is increased.
8. The transit lines become more and more congested during the rush hours.

For these reasons the proposed zoning ordinance has made scientific provisions for distributing the population and for securing to each section of the city as much light, air and relief from contagion as is consistent with housing of four or five times the present population within the city's present areas.

The proposed zoning ordinance has properly provided for various types of homes in appropriate sections of the city. One-family home sections are protected to retain their amenities. Sections are set aside where apartment houses are specifically encouraged. The great bulk of the present residential areas is preserved for the types of residences that are characteristic of Cincinnati—one- and two-family houses and small apartments.

One- and Two-Family Homes Encouraged

The zoning ordinance encourages the detached one- and two-family houses, the types of residence that tend to conserve and promote family life. These detached homes with their yards and gardens promote health, safety and comfort. They foster a high type of citizenship by encouraging families to take a greater interest in their neighborhood and city. They have great advantages in the proper rearing of future citizens. They help to keep many persons from breaking down under the nervous strain of modern city life and contribute to the efficiency and vigor of others.

Protecting Residence Districts From Intrusion by Business and Industry

The proposed zoning ordinance sets aside districts for business and industry and excludes them from residence neighborhoods. The violent protests that have been made during the past few years by home owners against invading businesses, show how great is the injury done to a residence district by such objectionable uses. In numerous cases these controversies have led to legal action.

How important protection is to residence districts is shown also by the fact that practicaliy every new residence subdivision is carefully restricted. Such restrictions protect the homes of the well-to-do, but they do not protect families in less fortunate circumstances.

Reasons for Excluding Business From Residence Districts

"An isolated neighborhood store may appear harmless, but is it? Increased noise is an incident of practically every business, even those businesses that are generally considered the least objectionable in this respect, such as the grocery store, the drug store, the millinery shop, etc. Business exists by attracting shoppers. The number of shoppers frequenting a business establishment, no matter what its character may be, as a rule, exceeds the number of persons who would in a day visit the same premises if used for residential purposes. Even a small shop will often serve several hundreds of customers in a day. This increased number of pedestrians diminishes the quiet of a street.

"In addition to the increased number of pedestrians there is also an increased number of vehicles on business streets, as compared with residential streets. This fact in itself, of course, adds to the noise on business streets, as all vehicular traffic is accompanied with a greater or less degree of noise.

"The loading and unloading of business vehicles always causes more or less disturbance to the peace of a residential neighborhood. Many stores have their goods consigned to them in crates, boxes, kegs or barrels which may be dumped from the delivery trucks onto the sidewalk without any fear of injuring the goods. Among the retail establishments especially offensive in this respect are the local hardware store and the dry goods store. The sawing of wood, the hammering, driving and removal of nails incident to the opening and closing of these boxes, causes, if anything, more noise than their loading and unloading.

"Noise injurious to home quiet also accompanies the conduct of certain businesses, as, for example, the rolling of balls in bowling alleys, the operation of motors and blowing of horns in garages, and the music and hilarity in theaters, ice cream parlors and dance halls. These establishments all keep open until late at night, and therefore very seriously interfere with the sleep and rest of the inhabitants in the district.

"Approximately one-fifth of the total population of a large city consists of children under five years of age. The necessity for quiet residence districts, so that the children can obtain a reasonable amount of sleep in the day time, is apparent. But in a large city it is not only young chil-

dren that need to sleep in the day time; there is also a huge army of night workers, newspapermen, telegraphers, telephone operators, motormen, policemen, firemen, janitors, bakers, etc. These, too, demand quiet residence districts so that they will be able to sleep during the day.

"The day sleep of the night worker is of vast importance, but the night sleep of the day worker is of far vaster importance. The same neighborhood businesses which disturb the rest of children and night workers during the day, also disturb the rest of the day worker at night. Local stores, it is true, generally close at six or seven o'clock in the evening, but on Saturday they usually remain open until ten or eleven o'clock. Then there are certain businesses which always close at a late hour. Drug stores, news stands, candy kitchens, cigar stores, delicatessen shops, etc., invariably remain open until at least ten o'clock; vaudeville, motion picture theaters and dance halls until eleven o'clock; billiard halls, pool rooms and bowling alleys until twelve or one o'clock.

"The intrusion of business is offensive to residential districts because it gives rise to increased dust. The more pedestrians and vehicular traffic a street has the more dust it will have and the more often will its dust be stirred up. In the first place, the wear of a sidewalk and pavement varies directly with the amount of traffic. That the flagging and pavement of a business street have to be renewed three or four times as often as that of a residential street proves this fact. In addition to pulverized asphalt and cement, there is, in the second place, also an increased amount of organic and metallic dust—manure from horses, grinding from steel and rubber tires, worn shoe leather and clothes. Certain businesses—carpet cleaning, shoddy mills, planing mills, etc.—are in their very nature dusty and should obviously be excluded from residence neighborhoods. But even though a business is in itself unaccompanied with trade dust its conduct in a residential district should be prohibited, as increased dust is an unavoidable incident to every business.

"The exclusion of business protects residence sections against offensive odors. Among the most notorious offenders against the amenities of residential districts, so far as a violation of the sense of smell is concerned, are the public garage, the stable, the fish market, the butcher shop, the poultry slaughter house. Today the smell of

gasoline escaping from misplaced garages permeates thousands of homes. The manure in stables, the decaying trade wastes in fish markets and butcher shops, and the wet feather in poultry slaughter houses, befouls the air in other thousands of homes. Odoriferous restaurants filled with fumes of frying fat and grease are hardly less annoying. The benzine emitted by dyeing and drying establishments and the turpentine by paint stores are not only offensive to the smell, but are actually so dangerous as to constitute a fire hazard. Objections like the above can be lodged against the presence of almost every business and industry situated in a residence district. That even a comparatively innocuous store exercises a potent influence over the character of a residential block is a matter of every-day experience. The adjoining residents move out, 'To let' signs go up, and in short time the whole street finds itself in transition from one kind of occupancy to another."

The foregoing considerations are presented at length in the report—"Proposed Building Zones for Newark, N. J."

If it is important that we prevent in the future congested housing conditions like those in our existing tenements; if it is important to prevent diseases such as rickets and tuberculosis; if it is important that Cincinnati's future generations of children shall be protected from the physical and moral dangers of the city streets; if it is important to society that home ownership be encouraged, then the case for the enactment of a sound, practical, reasonable zoning ordinance is unimpeachable.

From Statement by Raymond V. Ingersoll, Commissioner, Department of Parks, Brooklyn, May 25, 1916, to New York City Commission on Building Districts and Restrictions

Effect of districting.—I believe that, without doing any violence to existing conditions, this plan, if it goes into effect, will check the unnecessary growth of congestion of population in certain sections, diminish the fire hazards, decrease unnecessary street congestion and the dangers from street congestion, particularly to children who have to play in the streets; that it will be a very great aid to the city in properly locating its schools and libraries and other public buildings by its tendency to make the growth

normal and to make it possible to anticipate it: in other words, a general substitution of harmony and plan for chaos and ugliness.

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Stores on residential streets objectionable.—I think that a reasonable degree of separation of stores from residence districts is desirable. Take, for instance, the rattling through the streets of delivery wagons. Of course, there always must be delivery service from the stores to the residential districts, but if you have stores scattered indiscriminately through the residence sections there is just that much more noise and that much more danger of accident from the traffic that has to go through those streets, and it seems to me that your Commission has shown a very great deal of discretion in trying to separate the stores from the residence districts, and yet not to put them too far away, but always have them within reach, which, of course, is important.

Statement to New York City Zoning Commission, by Clarence H. Kelsey, President, Title Guarantee & Trust Company, March 30, 1916

Need for districting.—I have no doubt that the city has a right to direct future building development in accord with a well considered plan, and believe that it ought to exercise it immediately and firmly. If it does not do so, it is failing to protect itself and property values as well. Its present policy of allowing every owner of real estate to do as he pleases with his own, is a policy of self-destruction.

I do not wish to discuss the plan in detail, and I do not think the Commission should attempt to hear a vast number of property owners' individual views as influenced by the effect of the plan on their properties and attempt to reach a conclusion by reconciling these conflicting views, for the more property owners discuss the details, the more confused the situation will become. The Commission, if it is to succeed, will ultimately have to decide for itself, on broad general principles, what is best for the city's future development and adopt it without expecting to get the approval of a majority of the individual property owners. The conclusion should be based on the general good and

made effectual by right of the power of the city government to do what is best for the city at large.

I have no doubt that a great many property owners will see their particular properties limited in usefulness and somewhat depreciated in value, but if the plan is not adopted, I believe there will be a far greater depreciation affecting a far greater number of people.

On values as a whole, I have no doubt of the favorable effect of this proposed control of the improvement and use of real estate. There has been a great rescission in values during the last five years, and it has affected not only those who have gone counter to the new regulations sought to be established, but those who have not; and those who may complain of the effect of these regulations on their particular properties and who think that they should be left free to build as high as they please and use as they please, may, if nothing is done, and they do anticipate their neighbors and make a greedy improvement, find a much greater loss confronting them in the future depreciation of their new buildings. I believe such depreciation is sure to come from a continuance of the present policy, and such owners will lose less by the adoption of the restrictions now proposed. These restrictions will tend to steady values and enable all real estate owners to make reasonable use of their property. This is certainly better for the city as a whole than to continue to allow a few out of many to make unfair use of their property and depress still further the value of the remaining property and ultimately their own as well."

From "What the Banker Thinks of Zoning," an Article by George S. Edie, Vice-President, Westchester Trust Co., Yonkers, N. Y., in The National Municipal Review, May, 1924

The banker thinks no differently of zoning than does the ordinarily thoughtful citizen. He is, however, more interested in preserving values and preventing, as far as possible, unnecessary waste and unnecessary losses.

When one sees an apartment house erected in a district of private dwellings there comes to mind immediately the thought that someone is profiting at the expense of another. One knows that the apartment house is worth more because

of its location, and also that the owners of the houses in the immediate vicinity are losing values, because of the apartment house being located in that section.

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Again, we have seen an instance in New York City where, in a business district occupied by stores, industry in the form of manufacturing plants came in, and immediately the value of that location as store property decreased, and many of the stores went out of business. The section of Sixth Avenue in the neighborhood of 23rd Street at one time was the bright and shining example of a very prosperous business section, but upon the arrival of industry, and manufacturing establishments, we saw that district wiped out.

This came to my attention as a banker, as our bank was trustee for an estate which held some property in that neighborhood. We found that the value of that property had shrunk considerably from the time we took the estate over.

* * * * *

Zoning, in my estimation, is just orderly house building—just the orderly development and arrangement of a city. The object of zoning is to achieve regularity and orderliness in a city's growth and development. Zoning lays out areas for buildings for the various purposes and needs of a city. It exercises a strong influence upon property development and subdivision of vacant land. Zoning protects property values from irresponsible and unscrupulous speculative interests. And, finally, zoning prepares for the future and preserves and safeguards the present from unnecessary depreciation and loss; and works in all ways for the welfare, prosperity and advancement of a city.

* * * * *

An interesting fact that our experience with our zoning ordinance has developed is that in sections of the town where before there was zoning there was no building, because of the uncertainty of its future development, we find that since our zoning ordinance went into effect, that these sections have come into their own. Houses similar to those built in years gone by have recently been built. Such a section is the Ludlow section in the south end of our town.

This has taken place because that section is now stable. People know that no one can go in there and kill their values by future development and future building.

Let me speak of zoning as an investment from a civic standpoint. When our sessions were on with relation to our zoning ordinance in Yonkers we found some people clamoring for us to permit higher buildings and more families per acre than we thought wise.

After careful study we found that if the number of families per acre and the height of buildings were increased, our public utilities could not stand the pressure. It would require new sewers, new water lines, and many other additional expenditures.

As a matter of fact, in one section of the town which was formerly a private house section, apartment houses sprang up so fast that we were forced to tear up the old sewer, which would have been adequate to supply the needs of the one-family houses, and put in a large new sewer at great expense.

That is what I call inexcusable waste. Zoning a city is of great value. It permits the engineer to lay out his public work, as the future will demand, and saves money for the city.

The conservative banker seeks to invest in securities of certain value, where there is little change or chance of fluctuation. He likes something that is stable, and looks for safety and security of investment.

From the point of view of real estate investments, the banker is deeply interested in zoning. Under the laws of New York, savings banks, trust companies and trustees are permitted to loan two-thirds of the appraised value of real estate. Prior to zoning we saw in Yonkers very violent changes in real estate.

* * * * *

The depositor in the bank often needs credit; and when his statement shows real estate investments, it is very important that the statement be scrutinized very cautionsly by the banker. In days prior to zoning, where the customer showed a property in a residential district it was very important to know whether or not this district was restricted for a long or short term of years, inasmuch as this would decide very materially its real value. So many violent changes had occurred in our town that many real

estate values had been destroyed by unwise building, and the banker, of necessity, had to be very cautious.

Today, with zoning, a residence has a real value and can be used by the customer as security at its real worth or cost. Consequently, the customer, if in need of capital for his business, can borrow large sums on first mortgage because of the stability of his property. If in need of credit, the real estate can be properly listed on a statement at its true value. This enables the customer to have less invested in real estate, and more money is made available for trade, manufacture and commerce.

Leaflet "Why Zone Our Town?" by John Ihlder, Manager Civic Development Department, Chamber of Commerce of the United States

There are people who still think that America has not changed since the days before the Civil War, or the Revolution. They believe—one can not say they think, because they have given the matter no real thought—they merely believe that because we had no zoning regulations in 1850 or 1774, therefore none are needed now. They don't connect the lack of modern factories, office buildings, railways, automobiles and a hundred other recent developments with the placid life of those times. Our towns in those days did not have speed limits or traffic cops either. They did not need them then, but they do now. So they have them now.

So it is with zoning. Modern facilities for carrying on the business of life have added greatly to our efficiency, but at the same time they have made life more complicated and crowded and so have produced the traffic cop, whose main purpose is not to arrest the few selfish individuals who wilfully make nuisances or menaces of themselves, but to help by giving directions to the well-meaning majority of us who want to be considerate of the other fellow and who have intelligence enough to know that in the long run all will fare better and arrive more quickly if there is order and decency instead of disorder and jostling, bad temper and occasional smash-ups.

Zoning regulation is analogous to the traffic cop who prevents disasters and gets us all to our destinations faster by keeping things moving smoothly instead of letting them get into a snarl. It establishes three kinds of districts:

use, height and area. These it then classifies. Use, for example, is classified under industrial or manufacturing, commercial and residential.

Our towns and cities are created primarily by and for business. Consequently in planning and zoning them business is given first consideration. Those districts best suited to manufacturing, whether because of natural location or because of some artificial advantage, as the proximity of a railway, are allotted to manufacturing. Those best suited to commercial enterprise, as the business center of the community or smaller centers in outlying areas, are allotted to commerce. This does not mean that all land along a railway should be zoned for manufacturing any more than that every street with a street car line should be zoned for commerce. Any such easy-going rule would often give us far more industrial and commercial acreage than the community could use and so nullify the benefits of zoning.

But while the town is created primarily by and for business, yet the purpose of business is to make life better worth living. It provides the wealth by which we purchase the things that add to the fullness and joy of life: pleasant homes, education, recreation. Business therefore can not afford to spoil the things which it buys. That would be defeating its own purpose.

Zoning recognizes this and so safeguards our home districts, our schools, from being spoiled by the intrusion of injurious occupations. It recognizes the social and the economic value of investment in homes and it stabilizes the financial value of residence districts. It makes them better long-time investments both for the workingman who buys a cottage and the wealthy man who buys a mansion by protecting them against the blight of a misplaced factory or store. For the location of a factory or store in a residence district has much the same effect upon those who have invested their money in homes that the selfish automobile speeder has upon other users of the highways, makes them panicky, prone to believe that they have ventured upon something uncertain and unsafe.

The same is true of the distinction zoning draws between commercial and industrial districts. Each has its particular needs and each may be injuriously affected by intrusion of the other. But commerce is more likely to be injured by manufacturing than is manufacturing by commerce. So zoning bars manufacturing from commercial districts. On

the other hand dwellings may prove a very real handicap to industries by interfering with their expansion, by raising questions of public health and welfare. So recent zoning codes are barring dwellings from industrial districts.

Zoning then tends to stabilize real property values, to make them better investments. Its good effect in this way is most marked in residential districts, but it is also notable in commercial and industrial districts.

In the commercial and industrial districts it also brings order out of confusion—in those fortunate towns which zone themselves early it prevents the development of confusion. It treats a town as a great manufacturing concern treats its plant, placing each unit where it will be most efficient. In a large modern manufacturing plant the greatest care is taken to place each shop or unit so that the product in process may go from one to the next over the shortest possible route and without crossing other lines of transportation. Care is taken also to locate different units so that one will not handicap the other. The office is not placed next to the foundry, the noise and dirt of which will drown conversation and smudge all the letters and literature the firm sends out. Zoning applies the same principles to the whole town.

As an instance of zoning preventing blighted districts, the north side of Washington Square and parts of Greenwich Village are sometimes referred to. Before the zoning came, small industries and repair shops had begun to creep into and among the well built private houses which had been deserted by their former tenants. Rents were low and everything appeared to be on the down grade. Then when zoning began in 1916 many of these streets were zoned as residential. There was an immediate brightening of the locality. The large homes were altered into studios and bachelor apartments. Now rents are good, the houses are well kept up and artists complain that they are being crowded out.

No blighted districts have begun in this city since the zoning was established, but on the contrary, some that had begun have been redeemed.

A ZONING PRIMER

By the Advisory Committee on Zoning of U. S. Department of Commerce, Appointed by Secretary Hoover

Why Do We Need Zoning?

Someone has asked, "Does your city keep its gas range in the parlor and its piano in the kitchen?" That is what many an American city permits its household to do for it.

We know what to think of a household in which an undisciplined daughter makes fudge in the parlor, in which her sister leaves soiled clothes soaking in the bathtub, while father throws his muddy shoes on the stairs, and little Johnny makes beautiful mud pies on the front steps.

Yet many American cities do the same sort of thing when they allow stores to crowd in at random among private dwellings, and factories and public garages to come elbowing in among neat retail stores or well-kept apartment houses. Cities do no better when they allow office buildings so tall and bulky and so closely crowded that the lower floors not only become too dark and unsatisfactory for human use but for that very reason fail to earn a fair cash return to the individual investors.

"Live and let live" is a better motto for the modern city than the savage one of "dog eat dog."

It is this stupid, wasteful jumble which zoning will prevent and gradually correct. We must remember, however, that while zoning is a very important part of city planning, it should go hand in hand with planning streets and providing for parks and playgrounds and other essential features of a well-equipped city. Alone it is no universal panacea for all municipal ills, but as part of a larger program it pays the city and the citizens a quicker return than any other form of civic improvement.

* * * * *

Zoning Protects Property and Health

Suppose you have just bought some land in a neighborhood of homes and built a cozy little house. There are two vacant lots south of you. If your town is zoned, no one can put up a large apartment house on those lots, overshadowing your home, stealing your sunshine and spoiling the

investment of twenty years' saving. Nor is anyone at liberty to erect a noisy, malodorous public garage to keep you awake nights or to drive you to sell out for half of what you put into your home.

If a town is zoned, property values become more stable, mortgage companies are more ready to lend money, and more houses can be built.

A zoning law, if enacted in time, prevents an apartment house from becoming a giant airless hive, housing human beings like crowded bees. It provides that buildings may not be so high and so close that men and women must work in rooms never freshened by sunshine or lighted from the open sky.

Zoning Reduces the Cost of Living

By zoning, millions of waste from the scrapping of buildings in "blighted districts" may be eliminated.

A "blighted district" is a district, originally developed for residence or industry, in the future of which people have lost confidence.

The causes of such "blight" are manifold. The most familiar case is that of a residential district into which there have begun to creep various uses threatening rapid destruction of its value for residences—such new uses as sporadic stores, or factories, or junk yards. It is not that a few such inappropriate uses really spoil the district, but that people having lost confidence, start a panic like a "run on the bank." Hundreds of them hurry up to "unload" their properties at a sacrifice for any kind of use, no matter how objectionable to their neighbors—and the "blight" is on! Dwellings worth in the aggregate millions of dollars for the purposes for which they were built, and physically fit to serve those purposes for many years to come, with a moderate investment in alterations and improvements, are thus annually abandoned to purposes for which they are not fit, or are left to stand practically idle. Expensive public services of water, gas, electricity, sewers, and transportation are maintained at great waste in order to get through the "blighted" district to the more distant and newly fashionable location.

The total economic loss is enormous, and this loss and the risk of it are paid by the people, in the price of house rents or otherwise, as inevitably as they pay the price of the enormous fire losses, either directly or through insurance.

Proper zoning cuts these losses at their source, just as proper building regulations and fire protection cut fire losses at their source.

Again, miles of streets and sewers and other utilities, such as are ordinarily built when land is newly subdivided for dwellings, need never be constructed if we know that these areas will be devoted mainly to large factories. Industry will be more efficient, as well as homes more wholesome, if kept generally separate. Separation need not mean great distances for workers to travel. Concentration of uses and a fair apportioning of districts should reduce the amount of all transportation and secure economies not only directly for the worker but indirectly in the costs of production and marketing of goods.

If zoning can reduce the cost of living, why not have it?

Passages from "Elements of Land Economics," by Richard T. Ely and Edward W. Morehouse, Director of and Instructor in The Institute for Research in Land Economics and Public Utilities in The University of Wisconsin

p. 23. In our great cities, where land has its most intensive use, social control through building codes, planning and zoning laws, sanitary regulations, is growing. This tendency finds expression in what may be called the principle of social control: The more intensive the use of land, the more highly developed must be the social control. In such a complex society as ours, social control of some forms of land utilization is necessary to achieve the social ends which are set before each individual.

pp. 86ff. *Social Control of Urban Land Utilization.* The evil results of allowing a city to develop "naturally" is the best evidence of the need of social control of urban land utilization. The unregulated desire for profits from ownership of private property often leads to a short-sighted view. Owners of city lots, for instance, may seek to use their space up to the limit prescribed in the building law, only to find 15 or 20 years later that they have not allowed enough space for light and air. In the long run it does not pay to crowd buildings onto a lot when your neighbor is doing the same thing. The result is crowded districts like

those of New York City. Small parks are now being introduced into these New York districts, but they are enormously expensive and the work proceeds slowly.

Another striking illustration of the results of natural development is afforded by the direction of the growth of factory production. How often do we see fine, old residences blackened by the smoke of encroaching factories! In many rapidly growing factory towns houses that used to be the aristocratic and high-priced residences of the founders of the town are now low-priced and are surrounded by cheap dwellings or factories. No one would reasonably wish that such development had been wholly eliminated, for the sacrifice of some districts was probably inevitable if the town was to progress at all; but some of these losses in value might have been avoided if the development of the city had been controlled. In the long run it does not pay to leave development unregulated in the hands of profit-seeking individuals, for the temptation is very great to plan for large profits in early years, which tends in later years to cause a more rapid decline in values than is necessary.

The remedy for these undesirable results of natural zoning is in some form of social control of land utilization. In some German cities this social control has taken the form of development of new city areas by the municipal government itself. In the United States, reliance is placed on private initiative regulated by a city planning law accompanied by a zoning ordinance. In other words, the American policy of social control is to place limits on private utilization according to a preconceived plan of developing the whole urban area.

The zoning of a city is accomplished by pressure of public opinion operating through private and legislative channels. It has been said that the "destiny and growth of your town is largely affected by the foresight of the man who subdivides the land." The real estate dealer who plans, builds, and operates a subdivision can increase the amenities of land and stabilize values through restrictions on property if in no other way. In fact, the members of the real estate profession are in a more advantageous position to accomplish zoning by private efforts. Notwithstanding this potential, and in some cases actual, influence of the real

estate men, private owners are not bound by the professional standards of dealers. For this reason, among others, the future development of the city should not be left entirely to private individuals, but should be entrusted to a commission of city planning experts, backed by zoning ordinances and by an active, supporting public opinion expressed through the real estate operators. More and more cities are coming to realize that such social control of urban land utilization is the wise policy.

Controlled Zoning. Controlled zoning is the restriction by public authority of the different uses of land to certain sections of a city following a preconceived city plan. When a city ordains that factories shall be built only in certain districts or that apartment houses may not be built in certain residence districts, we have what may be called controlled zoning. Such zoning requires in the first place a classification of the several uses to which urban land may be put and a grading of those uses so that non-harmonious uses will be prevented from conflicting. In the second place, zoning requires a comprehensive plan of the city, designed to secure the most economical use of the urban area and a rational development which will stabilize land values as much as possible.

One of the main factors in the stabilizing of land values is the protection of the amenities of land by proper zoning. By amenities are meant beautiful scenery, a pleasant neighborhood, congenial neighbors, and all other inducements which add to the pleasure and comforts of living. Home owners are willing to pay for these amenities. In the case of farm land, scenery is an item in the productive unit. But the economic significance of such amenities in agricultural land values is of small account in comparison with their significance in comparison with urban values. These amenities can be reduced to almost nothing by improper zoning of a city, which allows, for example, the nuisances of a factory district to be present in a residence district. The encroachment of smoke, noise, and dirt is a primary cause of the rapid decline of residential land values. It is, therefore, something to be guarded against in zoning, since the chief function of zoning is to stabilize values.

SUPREME COURT OF THE UNITED STATES.

No. 31.—October Term, 1926.

The Village of Euclid, Ohio, and Harry W. Stein, Inspector of Buildings for the Village of Euclid, Appellants. *vs.* Ambler Realty Company.	Appeal from the District Court of the United States for the Northern District of Ohio.

[November 22, 1926.]

Mr. Justice Sutherland delivered the opinion of the Court.

The Village of Euclid is an Ohio municipal corporation. It adjoins and practically is a suburb of the City of Cleveland. Its estimated population is between 5,000 and 10,000, and its area from twelve to fourteen square miles, the greater part of which is farm lands or unimproved acreage. It lies, roughly, in the form of a parallelogram measuring approximately three and one-half miles each way. East and west it is traversed by three principal highways: Euclid Avenue, through the southerly border, St. Clair Avenue, through the central portion, and Lake Shore Boulevard, through the northerly border in close proximity to the shore of Lake Erie. The Nickel Plate railroad lies from 1,500 to 1,800 feet north of Euclid Avenue, and the Lake Shore railroad 1,600 feet farther to the north. The three highways and the two railroads are substantially parallel.

Appellee is the owner of a tract of land containing 68 acres, situated in the westerly end of the village, abutting on Euclid Avenue to the south and the Nickel Plate railroad to the north. Adjoining this tract, both on the east and on the west, there have been laid out restricted residential plats upon which residences have been erected.

On November 13, 1922, an ordinance was adopted by the Village Council, establishing a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses,

two-family houses, single family houses, etc., the lot area to be built upon, the size and height of buildings, etc.

The entire area of the village is divided by the ordinance into six classes of use districts, denominated U-1 to U-6, inclusive; three classes of height districts, denominated H-1 to H-3, inclusive; and four classes of area districts, denominated A-1 to A-4, inclusive. The use districts are classified in respect of the buildings which may be erected within their respective limits, as follows: U-1 is restricted to single family dwellings, public parks, water towers and reservoirs, suburban and interurban electric railway passenger stations and rights of way, and farming, non-commercial greenhouse nurseries and truck gardening; U-2 is extended to include two-family dwellings; U-3 is further extended to include apartment houses, hotels, churches, schools, public libraries, museums, private clubs, community center buildings, hospitals, sanitariums, public playgrounds and recreation buildings, and a city hall and courthouse; U-4 is further extended to include banks, offices, studios, telephone exchanges, fire and police stations, restaurants, theatres and moving picture shows, retail stores and shops, sales offices, sample rooms, wholesale stores for hardware, drugs and groceries, stations for gasoline and oil (not exceeding 1,000 gallons storage) and for ice delivery, skating rinks and dance halls, electric sub-stations, job and newspaper printing, public garages for motor vehicles, stables and wagon sheds (not exceeding five horses, wagons or motor trucks) and distributing stations for central store and commercial enterprises; U-5 is further extended to include billboards and advertising signs (if permitted), warehouses, ice and ice cream manufacturing and cold storage plants, bottling works, milk bottling and central distribution stations, laundries, carpet cleaning, dry cleaning and dyeing establishments, blacksmith, horseshoeing, wagon and motor vehicle repair shops, freight stations, street car barns, stables and wagon sheds (for more than five horses, wagons or motor trucks), and wholesale produce markets and salesrooms; U-6 is further extended to include plants for sewage disposal and for producing gas, garbage and refuse incineration, scrap iron, junk, scrap paper and rag storage, aviation fields, cemeteries, crematories, penal and correctional institutions, insane and feeble minded institutions, storage of oil and gasoline (not to exceed 25,000 gallons), and manufacturing and industrial operations of any kind other than, and any public utility not included in, a class

U-1, U-2, U-3, U-4 or U-5 use. There is a seventh class of uses which is prohibited altogether.

Class U-1 is the only district in which buildings are restricted to those enumerated. In the other classes the uses are cumulative; that is to say, uses in class U-2 include those enumerated in the preceding class, U-1; class U-3 includes uses enumerated in the preceding classes, U-2 and U-1; and so on. In addition to the enumerated uses, the ordinance provides for accessory uses, that is, for uses customarily incident to the principal use, such as private garages. Many regulations are provided in respect of such accessory uses.

The height districts are classified as follows: In class H-1, buildings are limited to a height of two and one-half stories or thirty-five feet; in class H-2, to four stories or fifty feet; in class H-3, to eighty feet. To all of these, certain exceptions are made, as in the case of church spires, water tanks, etc.

The classification of area districts is: In A-1 districts, dwellings or apartment houses to accommodate more than one family must have at least 5,000 square feet for interior lots and at least 4,000 square feet for corner lots; in A-2 districts, the area must be at least 2,500 square feet for interior lots, and 2,000 square feet for corner lots; in A-3 districts, the limits are 1,250 and 1,000 square feet, respectively; in A-4 districts, the limits are 900 and 700 square feet, respectively. The ordinance contains, in great variety and detail, provisions in respect of width of lots, front, side and rear yards, and other matters, including restrictions and regulations as to the use of bill boards, sign boards and advertising signs.

A single family dwelling consists of a basement and not less than three rooms and a bathroom. A two-family dwelling consists of a basement and not less than four living rooms and a bathroom for each family; and is further described as a detached dwelling for the occupation of two families, one having its principal living rooms on the first floor and the other on the second floor.

Appellee's tract of land comes under U-2, U-3 and U-6. The first strip of 620 feet immediately north of Euclid Avenue falls in class U-2, the next 130 feet to the north, in U-3, and the remainder in U-6. The uses of the first 620 feet, therefore, do not include apartment houses, hotels, churches, schools, or other public and semi-public buildings, or other uses enumerated in respect of U-3 to U-6, inclusive. The uses of the next 130 feet include all of

these, but exclude industries, theatres, banks, shops, and the various other uses set forth in respect of U-4 to U-6, inclusive.*

Annexed to the ordinance, and made a part of it, is a zone map, showing the location and limits of the various use, height and area districts, from which it appears that the three classes overlap one another; that is to say, for example, both U-5 and U-6 use districts are in A-4 area districts, but the former is in H-2 and the latter in H-3 height districts. The plan is a complicated one and can be better understood by an inspection of the map, though it does not seem necessary to reproduce it for present purposes.

The lands lying between the two railroads for the entire length of the village area and extending some distance on either side to the north and south, having an average width of about 1,600 feet, are left open, with slight exceptions, for industrial and all other uses. This includes the larger part of appellee's tract. Approximately one-sixth of the area of the entire village is included in U-5 and U-6 use districts. That part of the village lying south of Euclid Avenue is principally in U-1 districts. The lands lying north of Euclid Avenue and bordering on the long strip just described are included in U-1, U-2, U-3 and U-4 districts, principally in U-2.

The enforcement of the ordinance is entrusted to the inspector of buildings, under rules and regulations of the board of zoning appeals. Meetings of the board are public, and minutes of its proceedings are kept. It is authorized to adopt rules and regulations to carry into effect provisions of the ordinance. Decisions of the inspector of buildings may be appealed to the board by any person claiming to be adversely affected by any such decision. The board is given power in specific cases of practical difficulty or unnecessary hardship to interpret the ordinance in harmony with its gen-

*The court below seemed to think that the frontage of this property on Euclid Avenue to a depth of 150 feet came under U-1 district and was available only for single family dwellings. An examination of the ordinance and subsequent amendments, and a comparison of their terms with the maps, shows very clearly, however, that this view was incorrect. Appellee's brief correctly interpreted the ordinance: "The northerly 500 feet thereof immediately adjacent to the right of way of the New York, Chicago & St. Louis Railroad Company under the original ordinance was classed as U-6 territory and the rest thereof as U-2 territory. By amendments to the ordinance a strip 630 [620] feet wide north of Euclid Avenue is classed as U-2 territory, a strip 130 feet wide next north as U-3 territory and the rest of the parcel to the Nickel Plate right of way as U-6 territory."

eral purpose and intent, so that the public health, safety and general welfare may be secure and substantial justice done. Penalties are prescribed for violations, and it is provided that the various provisions are to be regarded as independent and the holding of any provision to be unconstitutional, void or ineffective shall not affect any of the others.

The ordinance is assailed on the grounds that it is in derogation of § 1 of the Fourteenth Amendment to the Federal Constitution in that it deprives appellee of liberty and property without due process of law and denies it the equal protection of the law, and that it offends against certain provisions of the Constitution of the State of Ohio. The prayer of the bill is for an injunction restraining the enforcement of the ordinance and all attempts to impose or maintain as to appellee's property any of the restrictions, limitations or conditions. The court below held the ordinance to be unconstitutional and void, and enjoined its enforcement. 297 Fed. 307.

Before proceeding to a consideration of the case, it is necessary to determine the scope of the inquiry. The bill alleges that the tract of land in question is vacant and has been held for years for the purpose of selling and developing it for industrial uses, for which it is especially adapted, being immediately in the path of progressive industrial development; that for such uses it has a market value of about $10,000 per acre, but if the use be limited to residential purposes the market value is not in excess of $2,500 per acre; that the first 200 feet of the parcel back from Euclid Avenue, if unrestricted in respect of use, has a value of $150 per front foot, but if limited to residential uses, and ordinary mercantile business be excluded therefrom, its value is not in excess of $50 per front foot.

It is specifically averred that the ordinance attempts to restrict and control the lawful uses of appellee's land so as to confiscate and destroy a great part of its value; that it is being enforced in accordance with its terms; that prospective buyers of land for industrial, commercial and residential uses in the metropolitan district of Cleveland are deterred from buying any part of this land because of the existence of the ordinance and the necessity thereby entailed of conducting burdensome and expensive litigation in order to vindicate the right to use the land for lawful and legitimate purposes; that the ordinance constitutes a cloud upon the

land, reduces and destroys its value, and has the effect of diverting the normal industrial, commercial and residential development thereof to other and less favorable locations.

The record goes no farther than to show, as the lower court found, that the normal, and reasonably to be expected, use and development of that part of appellee's land adjoining Euclid Avenue is for general trade and commercial purposes, particularly retail stores and like establishments, and that the normal, and reasonably to be expected, use and development of the residue of the land is for industrial and trade purposes. Whatever injury is inflicted by the mere existence and threatened enforcement of the ordinance is due to restrictions in respect of these and similar uses; to which perhaps should be added—if not included in the foregoing—restrictions in respect of apartment houses. Specifically, there is nothing in the record to suggest that any damage results from the presence in the ordinance of those restrictions relating to churches, schools, libraries and other public and semi-public buildings. It is neither alleged nor proved that there is or may be a demand for any part of appellee's land for any of the last named uses; and we cannot assume the existence of facts which would justify an injunction upon this record in respect of this class of restrictions. For present purposes the provisions of the ordinance in respect of these uses may, therefore, be put aside as unnecessary to be considered. It is also unnecessary to consider the effect of the restrictions in respect of U-1 districts, since none of appellee's land falls within that class.

We proceed, then, to a consideration of those provisions of the ordinance to which the case as it is made relates, first disposing of a preliminary matter.

A motion was made in the court below to dismiss the bill on the ground that, because complainant [appellee] had made no effort to obtain a building permit or apply to the zoning board of appeals for relief as it might have done under the terms of the ordinance, the suit was premature. The motion was properly overruled. The effect of the allegations of the bill is that the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses; and the attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety. Assuming the premises, the existence and maintenance of the ordinance, in effect, constitutes a present invasion of appellee's

property rights and a threat to continue it. Under these circumstances, the equitable jurisdiction is clear. See *Terrace* v. *Thompson*, 263 U. S. 197, 215; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535.

It is not necessary to set forth the provisions of the Ohio Constitution which are thought to be infringed. The question is the same under both Constitutions, namely, as stated by appellee: Is the ordinance invalid in that it violates the constitutional protection "to the right of property in the appellee by attempted regulations under the guise of the police power, which are unreasonable and confiscatory?"

Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.

The ordinance now under review and all similar laws and regulations must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances

and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim *sic utere tuo ut alienum non laedas*, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power. Thus the question whether the power to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. *Sturgis* v. *Bridgeman*, L. R. 11 Ch. 852, 865. A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. *Radice* v. *New York*, 264 U. S. 292, 294.

There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of over-crowding, and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances. See *Welch* v. *Swasey*, 214 U. S. 91; *Hadacheck* v. *Los Angeles*, 239 U. S. 394; *Reinman* v. *Little Rock*, 237 U. S. 171; *Cusack Co.* v. *City of Chicago*, 242 U. S. 526, 529-530.

Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this Court has upheld although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. *Hebe Co.* v. *Shaw*, 248 U. S. 297, 303; *Pierce Oil Corp.* v. *City of Hope*, 248 U. S. 498, 500. The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws

may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. It cannot be said that the ordinance in this respect "passes the bounds of reason and assumes the character of a merely arbitrary fiat." *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 204. Moreover, the restrictive provisions of the ordinance in this particular may be sustained upon the principles applicable to the broader exclusion from residential districts of all business and trade structures, presently to be discussed.

It is said that the Village of Euclid is a mere suburb of the City of Cleveland; that the industrial development of that city has now reached and in some degree extended into the village and, in the obvious course of things, will soon absorb the entire area for industrial enterprises; that the effect of the ordinance is to divert this natural development elsewhere with the consequent loss of increased values to the owners of the lands within the village borders. But the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines. If it be a proper exercise of the police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public if left alone, to another course where such injury will be obviated. It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.

We find no difficulty in sustaining restrictions of the kind thus far reviewed. The serious question in the case arises over the

provisions of the ordinance excluding from residential districts, apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded. Upon that question this Court has not thus far spoken. The decisions of the state courts are numerous and conflicting; but those which broadly sustain the power greatly outnumber those which deny it altogether or narrowly limit it; and it is very apparent that there is a constantly increasing tendency in the direction of the broader view. We shall not attempt to review these decisions at length, but content ourselves with citing a few as illustrative of all.

As sustaining the broader view, see *Opinion of the Justices*, 234 Mass. 597, 607; *Inspector of Buildings of Lowell* v. *Stoklosa*, 250 Mass. 52; *Spector* v. *Building Inspector of Milton*, 250 Mass. 63; *Brett* v. *Building Commissioner of Brookline*, 250 Mass. 73; *State* v. *City of New Orleans*, 154 La. 271, 282; *Lincoln Trust Co.* v. *Williams Bldg. Corp.*, 229 N. Y. 313; *City of Aurora* v. *Burns*, 319 Ill. 84, 93; *Deynzer* v. *City of Evanston*, 319 Ill. 226; *State ex rel.* v. *Houghton*, 164 Minn. 146; *State ex rel. Carter* v. *Harper*, 182 Wis. 148, 157-161; *Ware* v. *City of Wichita*, 113 Kan. 153; *Miller* v. *Board of Public Works*, 195 Cal. 477, 486-495; *City of Providence* v. *Stephens*, — R. I. —, 133 Atl. Rep. 614.

For the contrary view, see *Goldman* v. *Crowther*, 147 Md. 282; *Ignaciunas* v. *Risley*, 98 N. J. L. 712; *Spann* v. *City of Dallas*, 111 Tex. 350.

As evidence of the decided trend toward the broader view, it is significant that in some instances the state courts in later decisions have reversed their former decisions holding the other way. For example, compare *State ex rel.* v. *Houghton, supra*, sustaining the power, with *State ex rel. Lachtman* v. *Houghton*, 134 Minn. 226; *State ex rel. Roerig* v. *City of Minneapolis*, 136 Minn. 479; and *Vorlander* v. *Hokenson*, 145 Minn. 484, denying it, all of which are disapproved in the *Houghton* case (p. 151) last decided.

The decisions enumerated in the first group cited above agree that the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for this conclusion

are—promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires, and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community by excluding from residential areas the confusion and danger of fire, contagion and disorder which in greater or less degree attach to the location of stores, shops and factories. Another ground is that the construction and repair of streets may be rendered easier and less expensive by confining the greater part of the heavy traffic to the streets where business is carried on.

The Supreme Court of Illinois, in *City of Aurora* v. *Burns, supra,* pp. 93-95, in sustaining a comprehensive building zone ordinance dividing the city into eight districts, including exclusive residential districts for one and two-family dwellings, churches, educational institutions and schools, said:

"The constantly increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the State, either directly or through some public agency by its sanction, to limit individual activities to a greater extent than formerly. With the growth and development of the State the police power necessarily develops, within reasonable bounds, to meet the changing conditions. . . .

". . . The harmless may sometimes be brought within the regulation or prohibition in order to abate or destroy the harmful. The segregation of industries, commercial pursuits and dwellings to particular districts in a city, when exercised reasonably, may bear a rational relation to the health, morals, safety and general welfare of the community. The establishment of such districts or zones may, among other things, prevent congestion of population, secure quiet residence districts, expedite local transportation, and facilitate the suppression of disorder, the extinguishment of fires and the enforcement of traffic and sanitary regulations. The danger of fire and the risk of contagion are often lessened by the exclusion of stores and factories from areas devoted to residences, and, in consequence, the safety and health of the community may be promoted. . . . .

". . . The exclusion of places of business from residential districts is not a declaration that such places are nuisances or that they are to be suppressed as such, but it is a part of the general plan by which the city's territory is allotted to different uses in order to prevent, or at least to reduce, the congestion, disorder and dangers which often inhere in unregulated municipal development."

The Supreme Court of Louisiana, in *State* v. *City of New Orleans, supra,* pp. 282-283, said:

"In the first place, the exclusion of business establishments from residence districts might enable the municipal government to give better police protection. Patrolmen's beats are larger, and therefore fewer, in residence neighborhoods than in business neighborhoods. A place of business in a residence neighborhood furnishes an excuse for any criminal to go into the neighborhood, where, otherwise, a stranger would be under the ban of suspicion. Besides, open shops invite loiterers and idlers to congregate; and the places of such congregations need police protection. In the second place, the zoning of a city into residence districts and commercial districts is a matter of economy in street paving. Heavy trucks, hauling freight to and from places of business in residence districts, require the city to maintain the same costly pavement in such districts that is required for business districts; whereas, in the residence districts, where business establishments are excluded, a cheaper pavement serves the purpose. . . .

"Aside from considerations of economic administration, in the matter of police and fire protection, street paving, etc., any business establishment is likely to be a genuine nuisance in a neighborhood of residences. Places of business are noisy; they are apt to be disturbing at night; some of them are malodorous; some are unsightly; some are apt to breed rats, mice, roaches, flies, ants, etc. . . .

"If the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts."

The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear

children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities,—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. *Cusack Co.* v. *City of Chicago, supra,* pp. 530-531; *Jacobson* v. *Massachusetts,* 197 U. S. 11, 30-31.

It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon

the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality. In respect of such provisions, of which specific complaint is not made, it cannot be said that the land owner has suffered or is threatened with an injury which entitles him to challenge their constitutionality. *Turpin* v. *Lemon*, 187 U. S. 51, 60. In *Railroad Commission Cases*, 116 U. S. 307, 335-337, this Court dealt with an analogous situation. There an act of the Mississippi legislature, regulating freight and passenger rates on intrastate railroads and creating a supervisory commission, was attacked as unconstitutional. The suit was brought to enjoin the commission from enforcing against the plaintiff railroad company any of its provisions. In an opinion delivered by Chief Justice Waite, this Court held that the chief purpose of the statute was to fix a maximum of charges and to regulate in some matters of a police nature the use of railroads in the state. After sustaining the constitutionality of the statute "in its general scope" this Court said: "Whether in some of its details the statute may be defective or invalid we do not deem it necessary to inquire, for this suit is brought to prevent the commissioners from giving it any effect whatever as against this company." Quoting with approval from the opinion of the Supreme Court of Mississippi it was further said: "Many questions may arise under it not necessary to be disposed of now, and we leave them for consideration when presented." And finally: "When the commission has acted and proceedings are had to enforce what it has done, questions may arise as to the validity of some of the various provisions which will be worthy of consideration, but we are unable to say that, as a whole, the statute is invalid."

The relief sought here is of the same character, namely, an injunction against the enforcement of any of the restrictions, limitations or conditions of the ordinance. And the gravamen of the complaint is that a portion of the land of the appellee cannot be sold for certain enumerated uses because of the general and broad re-

straints of the ordinance. What would be the effect of a restraint imposed by one or more of the innumerable provisions of the ordinance, considered apart, upon the value or marketability of the lands is neither disclosed by the bill nor by the evidence, and we are afforded no basis, apart from mere speculation, upon which to rest a conclusion that it or they would have any appreciable effect upon those matters. Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them.

And this is in accordance with the traditional policy of this Court. In the realm of constitutional law, especially, this Court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police, with which we are here concerned.

Decree reversed.

Mr. Justice VAN DEVANTER, Mr. Justice MCREYNOLDS and Mr. Justice BUTLER, dissent.

A true copy.

Test:

Clerk, Supreme Court. U. S.